(10)

No. 84-778-CSY
Status: GRANTED

Title: Maryland, Petitioner
v.
Baxter Macon

Docketed:
November 12, 1984

Court: Court of Special Appeals of Maryland

Counsel for petitioner: Singleton, Ann E.

Counsel for respondent: Sandler, Burton W.

Entry	Date	Note	Proceedings and Orders
1	Nov 12 1984	G	Petition for writ of certiorari filed.
2	Nov 28 1984		One envelope of exhibits received.
3	Dec 13 1984		Brief of respondent Baxter Macon in opposition filed.
4	Dec 19 1984		DISTRIBUTED. January 11, 1985
5	Jan 14 1985		Petition GRANTED. Justice Powell OUT.
			**********
6	Feb 12 1985		Record filed.
7	Feb 12 1985		Certified copy of original record, 3 volumes, received.
8	Feb 28 1985		Joint appendix filed.
9	Feb 28 1985		Brief of petitioner Maryland filed.
10	Mar 4 1985		Brief amicus curiae of United States supporting petitioner filed.
11	Mar 15 1985		SET FOR ARGUMENT. Wednesday, April 17, 1985. (4th case).
12	Mar 22 1985		CIRCULATED.
13	Mar 27 1985	X	Brief of respondent Baxter Macon filed.
14	Mar 28 1985	X	Brief amicus curiae of American Booksellers Assn., et al. filed.
15	Mar 29 1985	X	Brief amicus curiae of American Civil Liberties Union filed.
16	Apr 9 1985	X	Reply brief of petitioner Maryland filed.
17	Apr 17 1985		ARGUED.

1 app

No. 84-778

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF MARYLAND,

Petitioner,

v.

BAXTER MACON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the arrest of Respondent was unconstitutional, where an undercover police officer who purchased two magazines from Respondent at an adult bookstore, arrested Respondent without a warrant and without submitting the magazines to a judicial officer?

2. Even assuming Respondent's warrantless arrest was illegal, whether the proper remedy was to exclude from evidence the magazines, which had been purchased by the undercover police officer prior to the warrantless arrest?

3. Even assuming that the magazines should have been suppressed, whether the proper remedy was to reverse Respondent's conviction and dismiss the charging document?

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OPINION OF THE COURT BELOW

The opinion of the Court of Special Appeals is reproduced in the Appendix.

STATEMENT OF JURISDICTION

The opinion of the Court of Special Appeals of Maryland was filed March 2, 1984. The State of Maryland's Petition for Writ of Certiorari was denied by the Court of Appeals of Maryland on September 14, 1984. Jurisdiction of this Court is invoked pursuant to 28 U.S.C., §1257(3) and Rules of the Supreme Court of the United States, Rule 17.1(b) and (c).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATUTES

Annotated Code of Maryland 1982 Repl. Vol.,

Article 27:

§594B. **Arrest by a police officer without warrant:**

> "(a) A police officer may arrest without a warrant any person who commits, or attempts to commit, any felony or misdemeanor in the presence of, or within the view of, such officer.
>
> (b) A police officer may, when he has probable cause to believe that a felony or misdemeanor is being committed in his presence or within his view, arrest without a warrant any person whom he may reasonably believe to have committed such offense."

§417 - Definitions:

As used in this subtitle,

> "(1) **"Matter"** means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.
>
> (2) **"Person"** means any individual, partnership, firm, association, corporation, or other legal entity.

(3) **"Distribute"** means to transfer possession of, whether with or without consideration.

(4) **"Knowingly"** means having knowledge of the character and content of the subject matter.

§418 - Sending or bringing into State for sale or distribution; publishing, etc., within State:

"Any person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

STATEMENT OF THE CASE

On May 6, 1981, Detectives Ray Evans and Roland B. Sweitzer, assigned to the Vice-Criminal and Narcotics Section of the Prince George's County Police Department, pursuant to an ongoing investigation of adult book stores in Prince George's County, went to Silver News, Inc., an adult book store located at 2488 Chillum Road, Hyattsville, Maryland. The investigation had been instigated following a series of complaints by citizens who were concerned that these stores were selling obscene materials to juveniles. Detective Sweitzer instructed Detective Evans to enter the

book store and purchase material that "showed explicit sexual conduct". Detective Evans entered the store and browsed for fifteen to twenty minutes before he selected two magazines wrapped together in clear plastic. The windows of the store were covered with paper to a point above eye-level for a normal sized person so that most people could not see in the store. There were magazines on display on the walls almost from the ceiling to the floor. On the right side, empty packages of eight millimeter movies were displayed. In the back was a movie room where customers could view for a fee the movies which were offered for sale. There were depictions of sexual acts on the covers of the magazines, most of which were wrapped in plastic.

Detective Evans took the two magazines out of the wrapper which was unsealed and examined them from cover to cover. He then took the magazines to Respondent who was on a platform behind the cash register. Evans purchased the two magazines for twelve dollars and paid for them with a fifty dollar bill supplied by the Vice section. Detective Evans then took the magazines to Detectives Sweitzer and Fickinger who were waiting in a car in the parking lot. They

examined the two magazines and as a result of their observations, determined that the photographs met the criteria they had used in previous warrants and arrests. The three officers then went inside the Silver News and placed Respondent under arrest for distributing obscene materials in violation of Article 27, §418. The fifty dollar bill was removed from the store by the officers at that time.

Respondent filed pretrial motions to dismiss and to suppress because a neutral judicial officer did not view the magazines prior to Respondent's arrest. At the hearing conducted September 1, 2, 15 and 16, 1981, in the Circuit Court for Prince George's County, the Honorable Robert J. Woods presiding, Respondent was joined with twelve co-defendants who had also been arrested for selling similar materials from other book stores. Respondent argued that he was entitled to dismissal of the charging document because his warrantless arrest constituted an illegal prior restraint on his right to freedom of expression.

Respondent also argued that the magazines should be suppressed because a police officer was not an ordinary paying customer. He contended that when an undercover

officer goes into a book store such as the Silver News and looks around, it is a search. When the police officer came into possession of the magazines by misrepresenting an exchange of money for goods he committed theft by "false pretense" under Maryland Annotated Code, Article 27, §341. Further, Respondent argued that when the officers retrieved the purchase money as evidence this rendered the prior sale void and meant that the taking of the fifty dollar bill constituted an illegal taking of property without due process of law. Therefore, Respondent argued that the retention of the magazine by the police as a result of the sham sale constituted an illegal seizure without a warrant.

In denying both motions, Judge Woods rejected Respondent's argument, finding instead, as the State had argued, that the bargained for exchange of magazines for money was not a seizure and that no prior judicial determination of obscenity was needed for the arrest of Respondent without a warrant for distribution of obscene matter.

The magazines were admitted at Respondent's jury trial. The only objection to their admission was based on

Respondent's lack of opportunity to have a voir dire examination of Detective Evans on the chain of custody. The State did not introduce the fifty dollar bill. At the conclusion of this four day trial from September 16-21, 1981, in which he asserted an entrapment defense, Respondent was found guilty of distribution of obscene matter. After waiving his right to speedy sentencing on December 2, 1981, Respondent was sentenced on January 25, 1983 to pay a fine of $500.00 plus $75.00 in court costs.

Respondent filed a timely appeal in the Court of Special Appeals. On March 2, 1984, the Court of Special Appeals reversed Respondent's conviction in a reported opinion by Judge Bishop (opinion attached in Appendix), holding that the warrantless arrest of Respondent was illegal. The court held that there was insufficient probable cause to support the warrantless arrest since the police had not taken the magazines to a judicial officer for a determination of obscenity. Notwithstanding the fact that the police officer had purchased the magazines from Respondent prior to the arrest, the Court of Special Appeals condemned this voluntary exchange of goods for money as a

"constructive seizure", based on the improper subjective intent of the officers to retrieve the purchase money later, and ordered that the magazines should have been suppressed to punish such police misconduct. Not only was Respondent's conviction reversed, but the Court of Special Appeals ordered that the indictment be dismissed. [1] The State of Maryland's Motion for Reconsideration was denied. The State then filed a Petition for Writ of Certiorari in the Court of Appeals of Maryland which was denied on September 14, 1981.

ARGUMENT

I.

THERE WAS ADEQUATE PROBABLE CAUSE TO SUPPORT THE WARRANTLESS ARREST OF RESPONDENT FOR DISTRIBUTION OF OBSCENE MATTER.

There is no question that the sale of obscene matter is illegal in Maryland and that the State can properly punish violations of Maryland Annotated Code, Article 27, §418

1 Respondent was not charged by indictment. The charging document was a Statement of Charges filed in the District Court for Prince George's County, Maryland. The case was transferred to the Circuit Court pursuant to Respondent's prayer for a jury trial.

prohibiting the distribution of obscene matter. Respondent does not and has not contested the constitutionality of this statute or the authority of State law enforcement officials to enforce violations of §418.

Maryland Annotated Code, Article 27, §594B provides that police officers may arrest persons who commit misdemeanors in their presence or whom they have probable cause to believe have committed a misdemeanor in their presence. Nevertheless, the Court of Special Appeals has created, by judicial fiat, an exception to this statute that a police officer can never, as a matter of law, have probable cause to arrest a person for distribution of obscene matter. This result was based on prior decisions of this Court which held that a police officer does not possess the requisite knowledge and sensitivity to seize suspected obscene materials without a warrant. In Roaden v. Commonwealth of Kentucky, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973) and Heller v. State of New York , 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973), this Court held that a police seizure of alleged obscene materials can only be undertaken pursuant to a search warrant issued after an ex parte probable cause

determination by an independent judicial officer. Although obscenity is not protected expression per se under the First Amendment it is presumptively protected until such a determination has been made.

The rationale behind these requirements is clear. A confiscatory seizure by law enforcement authorities, upon their determination of obscenity, effectively removes the works seized from public distribution. This represents the essence of a prior restraint of expression which is directly prohibited by the First Amendment. In addition, this Court has emphasized in Stanford v. Texas, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965) and Zurcher v. Stanford Daily, 436 U.S. 547, 564-65, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978) that the need to protect individual First Amendment rights from government suppression necessitates more stringent application of Fourth Amendment safeguards in obscenity cases than in other criminal cases.

However, there is no reason to extend the requirement of judicial scrutiny prior to seizure of alleged obscene materials to the arrest of persons who distribute the materials particularly where the mode of distribution is

voluntary sale to undercover police officers. The warrantless arrest of an individual cashier of an adult book store, without more, does not involve any prior restraint of presumptively protected materials under the First Amendment. Respondent was no more legally or physically restricted in his distribution of magazines than if the sales for which he has been charged were made to ordinary customers. Moreover, the mere fact that Respondent's arrest for distribution may inhibit him or others from selling the same or similar materials is not the kind of chilling effect which results in a prior restraint prohibited by the First Amendment. Milky Way Productions, Inc. v. Leary, 305 F.Supp. 288, 297 (S.D.N.Y. 1969, affirmed, 397 U.S. 98, 90 S.Ct. 817, 25 L.Ed.2d 78 (1970).

In finding the arrest in the instant case illegal, the Court of Special Appeals held that a "necessary predicate" to seizure of the person, as well as the allegedly obscene matter he distributes, is a prior judicial determination that there is probable cause to believe the matter is obscene. In support of its holding, the court relied on three cases of dubious value.

Penthouse International Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980) was a civil case where a number of publishers sought injunctive relief from a Georgia prosecutor who had embarked on a program of arresting everyone who distributed certain publications, highly publicizing their actions which caused retailers to withdraw those publications from their shelves. This resulted in economic loss even though they were not subject to criminal prosecution. The Fifth Circuit Court of Appeals found that this conduct amounted to an informal system of prior restraint by "constuctive seizure" and affirmed the granting of injunctive relief.

In Delta Book Distributors, Inc. v. Cronvich, 304 F.Supp. 662, 667 (E.D. La. 1969), a civil case involving mass seizures, the federal district court held that it could enjoin State criminal prosecution of book distributors, where no prior adversarial hearing had been held prior to the arrests and seizures of materials involved. Not only did this holding predate Heller v. New York, supra, where this Court heid that an adversary hearing was not required, but more importantly, the holding was reversed and remanded by this Court on

appeal in Perez v. Ledesma, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971), because the federal court had acted beyond its jurisdiction in intervening to enjoin the enforcement of State criminal laws.

Another case that the Court of Special Appeals relied on, Hall v. State, 229 S.E.2d 12 (Ga. App. 1976), was distinguished in Wood v. State, 240 S.E.2d 743 (Ga. App. 1977), cert. denied, 439 U.S. 899, 99 S.Ct. 265, 58 L.Ed.2d 247 (1978), because Wood involved an Atlanta policeman who purchased two magazines from the defendant and then arrested him without a warrant. Where the defendant voluntarily locked the store before being taken to the police station, there was no illegal seizure as in Hall v. State and Roaden v. Kentucky, because "the officer had probable cause to arrest the defendant because of a violation of our obscenity statute committed in the officer's presence" and because there was "no prior restraint of the freedom of expression by any unlawful state-initiated or state-enforced restraint." Id. at 744. Several courts have reached the same result as in Wood. See Carlock v. State, 609 S.W.2d 787 (Tex. Crim. App. 1981); Price v. State, 579 S.W.2d 492 (Tex. Crim.

App. 1979). In United States v. Fragus, 428 F.2d 1211, 1212-1213 (5th Cir. 1970), a case from the same circuit as Penthouse v. McAuliffe, [2] it was held that the arrest of a panderer of obscenity may be effected under the normal criminal processes without a prior judicial determination of the obscenity of the material he peddles.

The issue of whether or not the purchase of an allegedly obscene magazine by an undercover police officer constitutes probable cause for the officer to arrest the seller for distribution of obscene matter without a warrant is a question which has not been decided by this Court. Lower court results, both civil and criminal, have been divided. The State of Maryland maintains that its statute, Article 27, §594B, which allows police officers to arrest persons when a misdemeanor has occurred in their presence or when they have probable cause to believe that a misdemeanor has occurred in their presence is proper, and is not limited to

2 Even in Penthouse v. McAuliffe, the court acknowledged that the facts in Wood were different than those in Hall because of the purchase prior to the arrest. 610 F.2d at 1361.

those cases involving fleeing robbers. The Court of Special Appeals' opinion holds that categorically, as a matter of law, a police officer can never have probable cause to arrest a person for the misdemeanor of distribution of obscene matter without a warrant. Most, if not all of the other states, have comparable statutes which permit warrantless arrests by police officers under similar circumstances. If an exception is going to be made in obscenity cases, such a crucial public policy determination must come from the highest court in the land. Traditionally, probable cause has been found to exist when the facts and circumstances within the knowledge of the arresting officer, or of which he had reasonably trustworthy information, are sufficient to warrant a reasonably cautious person into believing that an offense had been committed by the person arrested. Draper v. United States, 79 S.Ct. 329, 358 U.S. 307, 3 L.Ed.2d 327 (1959). Indeed, this Court emphasized in Draper that the proof sufficient to establish guilt is quite different from the proof needed to substantiate the existence of probable cause.

Given the fluid concept of probable cause, which is quite distinct from the standard of proof necessary for guilt,

it is wrong for courts to categorically state, in the absence of a statute otherwise, that police officers, even experienced vice squad officers, can never, as a matter of law, have probable cause to believe that a person is distributing obscene matter in violation of state law. Review is warranted to determine whether a police officer who purchases allegedly obscene magazines can "reasonably believe" that the offense of distribution of obscene matter has occurred in his presence. No other crime requires that a warrant always be obtained prior to arrest. Review is of special importance due to the split in authority, since mere arrest, without more, does not prohibit public access to the material and does not constitute a prior restraint of protected expression under the First Amendment.

II.

EVEN IF, ASSUMING ARGUENDO, RESPONDENT WAS ILLEGALLY ARRESTED, SUPPRESSION OF THE MAGAZINES IS NOT WARRANTED WHERE THEY WERE PURCHASED PRIOR TO THE ARREST.

In its opinion, the Court found that the arrest and detention of Respondent in the instant case operated as a prior restraint since the Silver News book store was closed

following Respondent's arrest at 7:20 p.m. [3] Petitioner maintains that the closing of the store at approximately 7:30 p.m. for the remainder of that day, while perhaps a temporary dimunition of the public's access to the store, did not operate as an illegal prior restraint. Presumably the store was closed to the public each night until the next morning. There was no evidence that the store remained open to the public twenty-four hours a day. There was no reason to believe that the store was not open for business the next day. There was no evidence that any magazines or other

3 Although Det. Evans did not testify at the suppression hearing. Det. Sweitzer testified that the officers arrested Respondent at 7:20 p.m., that Respondent was handcuffed, that the $50 bill was retrieved and that the $38 change from the purchase was not returned to Respondent. It was only at trial that Respondent's counsel elicited testimony from Det. Sweitzer that Respondent was the only employee at the store and that he had been allowed to secure the store by locking it up before being transported to the police station. However, trial testimony may not be considered on appeal on review of the motion to suppress. Dobson v. State, 24 Md. App. 644, 649, 335 A.2d 124 (1975).

items were no longer on display or available for sale to the public the next day. Contrast this with the situation in Penthouse v. McAuliffe, where the arrests forced many book sellers to voluntarily withdraw certain publications from their shelves. Compare State v. Huddleson, 412 A.2d 1148 (Del. Super. 1980) with Carlock v. State, supra, and Wood v. State, supra.

Even if, assuming arguendo, the warrantless arrest of Respondent was illegal in the instant case, the only remedy to which Respondent was entitled was suppression of any evidence obtained through exploitation of the illegal arrest. Here, the only evidence which should or could have been suppressed was the fifty dollar bill which the police retrieved from the cash register at the time of Respondent's arrest since Respondent did not make any statements and no other evidence was obtained by police as a fruit of his arrest.

Although the Court of Special Appeals acknowledged in its opinion that an illegal arrest does not bar prosecution under Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), in its attempt to punish the police misconduct, the court went backwards in time to the sale of the magazines,

which occurred before the arrest, and termed it a "constructive seizure" in order to justify suppression of the magazines and provide Respondent with a meaningful remedy. Petitioner is unaware of any prior holding of this Court which would support such mental gymnastics. Essentially, the Court of Special Appeals has created a "bad faith" prong to the exclusionary rule: even if the police legally obtain evidence by purchase in an investigation of a criminal offense, that evidence can and should be suppressed as a "constructive seizure" if the subjective intent of the police at the time of the purchase is "bad" because they intended to recover the purchase money as evidence.

The Court of Special Appeals found support for its "backward bootstrapping" in State v. Furuyama, 637 P.2d 1095 (Haw. 1981). However, other courts have refused to find that police purchase of obscene magazines prior to a warrantless arrest for the distribution of the magazines constituted an illegal seizure requiring suppression of the magazines. In State v. Flynn, 519 S.W.2d 10, 12 (Mo. 1975), the Missouri Supreme Court explained:

> "The police officer purchased and paid for the book and he took possession of it by reason of that purchase. He owned it at the time he placed Appellant under arrest. It was the officer's, not appellant's. There is an attempt by appellant to contend that under the circumstances of this case, before he could be arrested for the sale of an obscene publication, it was necessary that the officer take the book to a magistrate for a determination of obscenity. He relies on such cases as Roaden v. Commonwealth of Kentucky, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973), and Heller v. State of New York, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973), to the effect that a seizure of alleged obscene material must be undertaken pursuant to a warrant issued after a probable cause determination by an independent magistrate. But, as previously pointed out in this case, there was no seizure. Appellant was placed under arrest for the commission of a misdemeanor in the presence of a police officer. We find no merit to Appellant's first point."

There is no seizure even when police officers have retrieved the purchase money after the arrest. State v. Perry, 567 S.W.2d 380 (Mo. App. 1978); State v. Cox, 619 S.W.2d 794 (Mo. App. 1981), cert. denied, 455 U.S. 976, 102 S.Ct. 1485, 71 L.Ed.2d 688 (1982).

In State v. Welke, 216 N.W.2d 641 (Minn. 1974), the Minnesota Supreme Court rejected the defendant's claim that his sale of three magazines to police officers was not a "bona fide" one because of the officers' subsequent warrantless seizure of other magazines after they arrested defendant without a warrant. The Minnesota Supreme Court explained:

> "Whatever the subjective intent of the two officers may have been, the transaction by which they obtained three magazines in exchange for money cannot be considered a search or seizure. Purchases by undercover agents from willing sellers, in places far more private than a book store, were held in Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966), not to violate the Fourth Amendment. Id."

For other cases holding that police purchases of allegedly obscene materials does not constitute a search or seizure, see Johnson v. State, 351 So.2d 10 (Fla. 1977); State v. Barrett, 292 S.E.2d 590 (S.C. 1982), cert. denied, 103 S.Ct. 388; People v. Peters, 368 N.Y.S.2d 753 (N.Y. Co. Ct. 1975); Speight v. State, 251 S.E.2d 36 (Ga. App. 1978), cert. denied, 444 U.S. 886; Cherokee News and Arcade, Inc. v. State, 533 P.2d 624, 626 (Okl. Crim. App. 1974); People v. Ridens, 282 N.E.2d 691 (Ill. 1972), vacated on other ground, 413, U.S. 912, appeal

after remand, 321 N.E.2d 264; State v. Dornblaser, 267 N.E.2d 434 (Ohio Com. Pleas 1971); and Goodwin v. State, 514 S.W.2d 942, (Tex. Crim. App. 1974)

Indeed, the purchase of suspected obscene materials has long been condoned in federal courts as a proper and effective investigative technique by law enforcement officials. In United States v. Gower, 316 F.Supp. 1390 (D.C. 1970), affirmed without opinion (D.C. Cir. 1971), vacated, 413 U.S. 914, vacated on other grounds, 413 U.S. 914, 93 S.Ct. 3067, 37 L.Ed.2d 1029 (1973), affirmed, 503 F.2d 189 (1974), an undercover police officer purchased several photographs, and later, a reel of film from the defendant. The court noted that ". . . the materials which are the subject of the charge were purchased by an undercover policeman, and not seized." Id. at 1393 (Emphasis in original). See Engstrom v. Robinson, 317 F.Supp. 124, 125 (S.D. Ala. 1970) and Star-Satellite, Inc. v. Rosetti, 317 F.Supp. 1339, 1342 (S.D. Miss. 1970). See also, United States v. Fifty Magazines, 323 F. Supp. 395, 401 (D. R.I. 1971) noting the "purchase exception". In United States v. Lethe, 312 F.Supp. 421, 422 (Ed. Cal. 1970) it was stated:

> "However, where a defendant has voluntarily parted with literature or films, as in the instant case, he cannot complain of a suppression when he is later prosecuted. I conclude that no judicial determination is required prior to trial."

In Conlisk v. Weintraub, 345 F.Supp, 780, 788 (N.D. Ill. 1971) the district court held that no reason existed for a prior hearing to determine obscenity under Illinois obscenity statutes, since no prior restraint had been placed upon an individual who had been subject to one arrest for sale of one publication which was not offensive to rights secured by the First Amendment.

The decision of the Court of Special Appeals is a totally unwarranted extension of Fourth Amendment search and seizure law by indiscriminate application of the exclusionary rule in a case that has a First Amendment implication but no Fourth Amendment violation. There was no search or seizure in the Fourth Amendment sense when the defendant voluntarily delivered incriminating evidence to police. See State v. Minneker, 271 N.E.2d 821 (Ohio 1971). In Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed. 312 (1966), a defendant who had sold narcotics to an undercover police officer argued that the purchase

constituted an unreasonable search and seizure under the Fourth Amendment. This Court observed that Lewis had:

> " . . . invited the undercover agent to his home for the specific purpose of executing a felonious sale of narcotics. Petitioner's only concern was whether the agent was a willing purchaser who could pay the agreed price.
>
> * * *
>
> Were we to hold the deceptions of the agent in this case constitutionally prohibited, we would come near to a rule that the use of undercover agents in any manner is virtually unconstitutional per se. Such a rule would, for example, severely hamper the Government in ferreting out those organized criminal activities that are characterized by covert dealings with victims who either cannot or do not protest." 385 U.S. at 210, 87 S.Ct. at 427, 65 L.Ed.2d at 315-16.

Regardless of whether the Court of Special Appeals approved of the police tactics used in the instant case, the magazines could not be excluded as the "fruit of the poisonous tree". In United States v. Artieri, 491 F.2d 440 (2nd Cir. 1974), it was held that evidence lawfully seized incident to an arrest is not transmuted into an unlawful seizure by a subsequent unconstitutional seizure made in the same case. In Wong Sun v. United States, 371 U.S. 471, 83

S.Ct. 407, 9 L.Ed.2d 441 (1963), this Court made clear that only those items would be suppressed which had been obtained by police through exploitation of the illegality; evidence which was obtained by means sufficiently distinguishable to be purged of the primary taint was thus admissible. 371 U.S. at 488, 83 S.Ct. at 417, 9 L.Ed.2d at 455. In United States v. Crews, 445 U.S. 463, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980), this Court explained that in the "fruit of the poisonous tree" cases, the "challenged evidence was acquired after some initial Fourth Amendment violation". 445 at 471, 100 S.Ct. at 1249, 63 L.Ed.2d 545 (emphasis in original). An illegal arrest "cannot not deprive the Government of the opportunity to prove [a defendant's] guilt through the introduction of evidence which is wholly untainted by the police misconduct". 445 U.S. at 474, 100 S.Ct. at 1251, 63 L.Ed.2d at 548. In United States v. Payner, 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980), rehearing denied, 448 U.S. 911, 101 S.Ct. 25, 65 L.Ed.2d 1172, on remand, 629 F.2d 1181, this Court emphasized that even if the police action was illegal and unconstitutional, it did not require application of the exclusionary rule unless there had been a violation of Fourth

Amendment rights. Moreover, this Court cautioned against the "considerable harm" that would flow from "the indiscriminate application" of the exclusionary rule. 447 U.S. at 734, 100 S.Ct. at 2445, 65 L.Ed.2d at 475.

Consequently, in the instant case, it is clear that the purchase of the magazines by police was not achieved by exploitation of the illegal arrest. The purchase preceded the illegal arrest and was sufficiently removed from the taint of the arrest to permit its admissibility. Punishing the government for questionable police conduct is an "inadequate reason" to apply the exclusionary rule. United States v. Feaster, 494 F.2d 871, 876 (5th Cir. 1974), cert. denied, 419 U.S. 1036, 95 S.Ct. 522, 42 L.Ed.2d 313 (1974).

Therefore, under the traditional criteria used by this Court and others, the purchase of the magazines by the undercover police officer in the instant case cannot be considered a search or seizure in the Fourth Amendment sense either literally or constructively. There was no forcible dispossession where Respondent, a cashier in an adult book store, sold the two magazines to Det. Evans. Respondent voluntarily delivered the magazines to the police officer in

exchange for money. As in Lewis, the seller sold the goods at his own peril. The fact that Respondent regrets having voluntarily delivered the magazines to a disguised police officer in exchange for money does not render the police officer's actions illegal.

Although the Court of Special Appeals was obviously bothered by the fact that the police officers retrieved not only the fifty dollar bill which had been used to purchase the magazines, but kept the change they had obtained in the transaction, Petitioner is unaware of any formal or informal demand by Respondent to retrieve the thirty-eight dollars in change. Even if, assuming arguendo, the retention of this money, which was not used as evidence in Respondent's trial, is wrong, or not to be condoned, it has no effect on the validity of the initial police purchase of the magazine. See United States v. Wild, 422 F.2d 34 (2nd Cir. 1969). It is doubtful, whether Respondent, who was a clerk in the bookstore, and who is no longer employed there, has requisite title to the currency, to be entitled to its return, or to complain about its retention. See Welke v. State, 216 N.W.2d 641 (Minn. 1974). Regardless, the important thing is, that as

much as the Court of Special Appeals may disapprove of such police tactics, they are not so reprehensible as to render an otherwise bona fide purchase into a 'constructive seizure' so that the court may give Respondent relief from criminal prosecution for actions which the court may not consider criminal or the proper target of law enforcement officials.

III.

EVEN IF RESPONDENT'S CONVICTION SHOULD HAVE BEEN REVERSED BECAUSE THE PURCHASE OF THE MAGAZINES WAS AN ILLEGAL "CONSTRUCTIVE SEIZURE", DISMISSAL OF THE CHARGING DOCUMENT WAS AN IMPROPER REMEDY.

The Court of Special Appeals was not content to merely suppress the evidence and reverse Respondent's conviction, upon finding that the magazines should have been suppressed as a result of the "constructive seizure", but it took the additional step of ordering that the charging document be dismissed under this Court's holding in Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). In Burks, this Court was presented with the question of whether a defendant may be tried a second time when a reviewing court has determined that in a prior trial the

evidence was insufficient to sustain the verdict of the jury. This Court carefully distinguished between reversal for trial error and reversal for evidentiary insufficiency. In holding that retrial to correct trial error is not constitutionally proscribed by the Double Jeopardy Clause this Court held:

> "In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair re-adjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished." 437 U.S. at 15, 98 S.Ct. at 2149, 57 L.Ed.2d at 12.

In Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), this Court held that the standard announced in Burks was applicable to State prosecutions since the "constitutional prohibition against double jeopardy is fully applicable to State criminal proceedings". 437 U.S. at 24, 98 S.Ct. 2154, 57 L.Ed.2d at 21. However, the reversal by the

Court of Special Appeals in the instant case was not predicated upon insufficiency of the evidence adduced at the trial, but upon the erroneous admission of illegally obtained evidence. Once that inadmissible evidence was discounted, there was insufficient evidence to permit the trier of fact to convict Respondent. Thus, the question is whether in such circumstances, the double jeopardy clause automatically prohibits a retrial. This Court recognized this question in Greene but left it open:

> "We express no opinion as to the double jeopardy implications of a retrial following such a holding [that once inadmissible evidence is discounted, there was sufficient evidence to permit the jury to convict]." Id., 437 U.S. at 26, n.9, 98 S.Ct. at 2155, 57 L.Ed. at 22.

The issue left unresolved in Burks and Greene has been decided by numerous State and federal courts and two divergent views have emerged. For decisions ordering an automatic acquittal in these circumstances see United States v. Santora, 600 F.2d 1317 (9th Cir. 1979); State v. Alexander, 281 N.W.2d 349 (Minn. 1979); State v. Bannister, 594 P.2d 133 (Ha. 1979); In Re M.L.H. 399 A.2d 556 (D.C. 1979); Sloan v.

State, 584 S.W.2d 461 (Tenn. Crim. App. 1979); State v. Abel, 600 P.2d 994 (Utah 1979).

For cases holding that retrial is not automatically barred in these circumstances, see United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979), cert. denied, 445 U.S., 961, 100 S.Ct. 1647, 64 L.Ed.2d 236 (1980); United States v. Block, 590 F.2d 535, 543 (4th Cir. 1978); People v. Sisneros, 606 P.2d 1317, 1319 (Colo. App. 1980); Hall v. State, 259 S.E.2d 41 (Ga. 1979); Irons v. State, 397 N.E.2d 603, 605-06 (Ind. 1979); Phillips v. Commonwealth, 600 S.W.2d 485, 486-87 (Ky. App. 1980); State v. Wood, 596 S.W.2d 394, 397-99 (Mo. 1980); Ex Parte Duran, 581 S.W.2d 683, 684-86 (Tex. Crim. App. 1979); State v. Lamorie, 610 P.2d 342, 347 (Utah 1980); (compare with State v. Abel, above); State v. Van Isler, 283 S.E.2d 836, 839 (W.Va. 1981); Commonwealth v. Taylor, 418 N.E.2d 1226, 1233-34 (Mass. 1981); State v. Verdine, 624 P.2d 580, 584-585 (Or. 1981) and State v. Boone, 393 A.2d 1361, 1367-1370 (Md. 1978).

In the instant case, if the evidence was illegally seized, the proper remedy for Respondent was suppression of the evidence and reversal of his convictions. However, the

Court of Special Appeals erred in automatically barring the State from a retrial simply because evidence was erroneously admitted at the original trial. It should not be up to the reviewing court to decide whether or not the State can prove its case by other means upon retrial, however unlikely it might appear at that time to the appellate judges. Even in Furuyama, supra, the Hawaii Supreme Court recognized that dismissal of the indictment was not the proper sanction for the erroneous admission of evidence at trial which had been obtained by the police in violation of the Fourth Amendment. There, the Hawaii Supreme Court reversed the conviction and remanded the case to the lower court for further proceedings consistent with its opinion.

It may be in the instant case, that the State cannot prove the charges against Respondent at a new trial without the magazines. On the other hand, it may be possible for the State to do so. But that is a decision for the State's Attorney to make upon remand of the case to the Circuit Court for Prince George's County. Appellate courts should simply not be allowed to decide on the basis of the appellate record before them, which may not involve all of the evidence the

State has available to it, whether or not a case can be proved on retrial without the admission of illegally obtained evidence.

CONCLUSION

This Court must review the Court of Special Appeals opinion which holds contrary to all established American law, that a police officer can never, as a matter of law, ever have probable cause to arrest a person without a warrant for a certain crime - the distribution of obscene matter. This Court must decide whether an ex parte hearing to determine whether material is obscene is necessary prior to a seizure of the distributor as well as prior to seizure of the allegedly obscene materials. By condemning the police use of disguise, purchase of materials and retrieval of "buy money", the Court of Special Appeals has indiscriminately applied the exclusionary rule because of its First Amendment implications even where there is no Fourth Amendment violation, simply because it did not approve of the police tactics used. Although First Amendment protections are to be scrupulously honored, that does not require suppression of evidence which is obtained without violation of the Fourth

Amendment. There was no Fourth Amendment violation of Respondent's privacy where he voluntarily parted with the magazines for money regardless of the subjective intent of the buyer. This Court has never required suppression of validly obtained evidence simply because police have subsequently detained someone without adequate probable cause. Nor has it automatically barred retrial because evidence was erroneously admitted at trial. Review of this case is absolutely necessary in order to define the parameters when protections of the First Amendment intersect with those of the Fourth Amendment.

Respectfully submitted,

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APPENDIX

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 226

September Term, 1983

BAXTER MACON

v.

STATE OF MARYLAND

Bishop
Adkins
Morton, James C., Jr.
(Ret. Specially
Assigned),

JJ.

OPINION BY BISHOP, J.

Filed: March 2, 1984

On September 21, 1981, a Prince George's County jury convicted the appellant, Baxter Macon, of violating Article 27, section 418 of the Maryland Annotated Code, which prohibits knowing distribution of obscene material. Fined $500.00 plus $75.00 court costs, appellant asks:

I. Were law enforcement officers required to obtain a judicial determination that there was probable cause to believe the matter distributed by appellant was obscene before they could seize it and arrest him?

II. Did the State fail to prove that appellant distributed obscene matter knowingly?

III. Does the First Amendment protect distribution of material that has not yet been judicially declared obscene?

We reverse on the basis of the first issue, and therefore need not address the other two.

Facts

As part of an investigation of adult bookstores in Prince George's County, Detective Ray Evans entered the Silver News adult bookstore, browsed for about twenty minutes and then selected for purchase two magazines enclosed in a clear plastic wrapper. Detective Evans paid

appellant with a fifty dollar bill, from which was taken the $12.00 charge for the magazines. Appellant placed the magazines in a brown paper bag and returned them to Evans, who then left the store. Detectives Sweitzer and Fickinger, who had been waiting in a car parked on a nearby lot, viewed the magazines and decided that, in their opinion, the magazines were obscene matter. Without consulting a judicial officer, they then entered the bookstore with Evans and placed appellant under arrest. They allowed appellant to usher out patrons and close the store before taking him away in handcuffs. When they made the arrest, the officers retrieved the fifty dollar bill that had been used for the "purchase;" [1] they did not return the change.

Law

Because there was no prior judicial determination of obscenity, and therefore no warrant authorizing the officers to seize the alleged obscene matter or arrest its distributor, appellant argues that the trial court should have suppressed the magazines and dismissed the charges.

1. For reasons stated, infra, we hold that this "purchase" amounts to an unlawful seizure.

A.

The primary question presented for our consideration, then, is whether a judicial officer must decide that there is probable cause to believe that matter is obscene before the matter or its distributor may be seized. We conclude, based on the ensuing analysis, that a warrant is needed to provide a procedural safeguard for freedom of expression protected by the First Amendment. The Supreme Court had declared:

> "We held in Roth v. United States, 354 U.S. 476, 485, that 'obscenity is not within the area of constitutionally protected speech or press.' But in Roth itself we expressly recognized the complexity of the test of obscenity fashioned in that case, and the vital necessity in its application of safeguards to prevent denial of 'the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.' Id. p.488. We have since held that a State's power to suppress obscenity is limited by the constitutional protections for free expression.
>
> * * *
>
> ". . . [T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools. . . ." Speiser v. Randall, 357 U.S. 513, 525. It follows that, under the

> Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possibile consequences for constitutionally protected speech."

Marcus v. Search Warrant, 367 U.S. 717, 730, 731 (1961). Accord Bantam Books, Inc. v. Sullivan, 372 U.S. 58,65-66 (1963); A Quantity of Books v. Kansas, 378 U.S. 205, 212 (1964); Tyrone, Inc. v. Wilkerson, 410 F.2d 639, 641 (4th Cir. 1969); Europo Books v. Pomerleau, 41 Md. App. 114, 121 (1979).

The need to protect first amendment rights from government suppression necessitates more stringent application of fourth amendment safeguards in obscenity cases than in other criminal cases. Zurcher v. Stanford Daily, 436 U.S. 547, 564-65 (1978); W. LaFave, Search and Seizure, §6.7 (e) (1978); 50 Am.Jur.2d, Lewdness, Indecency and Obscenity, §12 (1970). Primary among these safeguards is the warrant requirement. The complexity of the test for obscenity, and the need to ensure that constitutionally protected speech is not discouraged, require that the probable cause determination of obscenity be entrusted not to the police officer, who may lack legal expertise or impartiality,

but to the judicial officer, whose knowledge of the law, coupled with his neutrality and detachment, qualify him to make such a decision. In Marcus v. Search Warrant, supra, the Supreme Court found that a search warrant authorizing police to seize "obscene . . . publications", with no definition of this term to circumscribe their discretion, lacked sufficient particularity:

> "It is no reflection on the good faith or judgment of the officers to conclude that the task they were assigned was simply an impossible one to perform with any realistic expectation that the obscene might be accurately separated from the constitutionally protected. They were provided with no guide to the exercise of informed discretion, because there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity." 367 U.S. at 732.

Accord Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979). See also Lee Art Theatre v. Virginia, 392 U.S. 636 (1968) (warrant must be based on more than an officer's conclusory assertion of obscenity).

In Roaden v. Kentucky, 413 U.S. 496 (1973), a county sheriff viewed a sexually explicit film, then, acting without a warrant, arrested the theatre manager and seized one copy of

the film. The Supreme Court found that protection of first amendment freedoms could not be left to the whim of a law enforcement officer:

> "The setting of the bookstore or the commercial theater, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is 'unreasonable' in the light of the values of freedom of expression.
>
> * * *
>
> The seizure proceeded solely on a police officer's conclusions that the film was obscene; there was no warrant. Nothing prior to seizure afforded a magistrate an opportunity to 'focus searchingly on the question of obscenity.' See Heller v. New York, ante, at 488-489; Marcus v. Search Warrant, 367 U.S. at 732. If, as Marcus and Lee Art Theatre, held, a warrant for seizing allegedly obscene material may not issue on the mere conclusory allegations of an officer, a fortiori, the officer may not make such a seizure with no warrant at all. 'The use by government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new. . . . The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression.' Marcus v. Search Warrant, supra, at 724, 729." Id. at 504, 506.

Thus, consideration of first amendment rights necessitates obtention of a judicial warrant as a precondition to seizure of allegedly obscene materials. [1] Zurcher v.

1. The Court established one exception to the warrant requirement, when police are faced with a "now or never" situation in which they must seize the allegedly obscene material or its distributor instantly or lose the opportunity. 413 U.S. at 505-06. We are not convinced that there were such exigent circumstances in this case. On the contrary, it appears that the Silver News book store was a continuing business that had been in operation at the same location for five to six years. There is nothing in the record to indicate that appellant or the magazines would not have been subject to seizure after the time required to have a neutral magistrate review the material and make a probable cause determination of obscenity. Cf. Gotlieb v. State, 406 A.2d 270, 273-75 (Del. 1979) (continuing business).

The hearing to obtain a warrant need only be ex parte, not adversarial. In Heller v. New York, 413 U.S. 483, 488 (1973) the Supreme Court stated that it had never held or implied the need for an adversarial hearing prior to initially seizing samples of allegedly obscene materials. It did not perceive that an adversary hearing would protect first amendment rights significantly better than an ex parte proceeding. Id. at 493. See also Roaden v. Kentucky, supra, 413 U.S. at 505 n.5; Lo-Ji Sales, Inc. v. New York, supra, 442 U.S. at 327-28 (distinguishing final restraint effected by large-scale seizure); Milky Way Productions, Inc., v. Leary, 305 F.Supp. 288, 296-97 (S.D.

Standford Daily, supra, 436 U.S. at 565; Flack v. Municipal Court for Anaheim-Fullerton, J.D., 429 P.2d 192 (Cal. 1967); State of New Jersey v. Parisi, 183 A.2d 801 (N.J. 1962). See generally Annot., 5 A.L.R.3d 1214 §4 (1966).

The same reasoning applies to seizure of persons allegedly distributing such materials.

A warrantless arrest is another type of seizure constitutionally required to be reasonable; Payton v. New York, 445 U.S. 573, 585 (1980). "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause. . . ." Beck v. Ohio, 379 U.S. 89, 96 (1964). Such safeguards are especially important in a case such as this, due to the aforementioned threat the police action poses to constitutionally protected speech.

In Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980) the state claimed that police officers

N.Y. 1969) (Frankel, J.), aff'd. 397 U.S. 98 (1970). For the same reason, an adversarial hearing is not a necessary precondition to issuance of a warrant to arrest the alleged purveyors of obscene material. United States v.Green, 284 A.2d 879, 882 (D.C. App. 1971); Adler v. Pomerleau, 313 F. Supp. 277, 286 (D.Md. 1970) (3-judge court). An ex parte hearing will suffice.

could arrest suspects for crimes committed in the officers' presence, including distribution of obscene matter. The Fifth Circuit Court of Appeals responded:

> "The problem with appellant's claim is that the ability to make a warrantless arrest for an offense committed in the officer's presence contemplated the officer's ability to determine that an offense had actually been committed. Appellant is attempting to apply a statute normally appropriate for the case of a fleeing robber to items presumptively protected by the First Amendment. Appellant is incorrect in his belief that he or his agents may properly make the initial determination concerning the obscenity of a publication and that he may make a warrantless arrest if he determines that the subject matter of a publication is obscene." Id. at 1359.

Consequently, a necessary predicate to seizure of the person, as well as the allegedly obscene matter he distributes, is a prior judicial determination that there is probable cause to believe the matter is obscene. See also Hall v. State, 229 S.E.2d 12 (Ga. 1976); Delta Book Distributors, Inc. v. Cronvich, 304 F.Supp. 662, 667 (E.D. La. 1969). But see Price v. State, 579 S.W.2d 492, 495 (Tex.Crim.App. 1979); Carlock v. State, 609 S.W. 2d 787 (Tex.Crim.App. 1980).

A group of cases strikingly similar to appellant's were decided in State v. Furuyama, 637 P.2d 1095 (Haw. 1981). In some of those cases, plainclothes police officers purchased allegedly obscene magazines, then confiscated the purchase money and arrested the sellers. The Furyama court, citing the long line of Supreme Court decisions to which we have alluded, observed that:

> "the Supreme Court 'has been scrupulous in its insistence that the sensitive task of distinguishing legitimate from illegitimate speech be confided in a judicial office, rather than in the police. Lee Art Theatre v. Virginia, supra; Marcus v. Search Warrant, supra.'" Id. at 1100.

It held accordingly that:

> "a police officer may not effect a warrantless arrest in a setting where first amendment freedoms are implicated.
>
> * * *
>
> [J]ust as an officer's conclusory opinion that arguably protected material is pornographic does not give rise to probable cause supporting the issuance of a warrant authorizing its seizure . . . , such opinion cannot sustain the warrantless arrest of its putative promoter. See Roaden v. Kentucky, supra, 413 U.S. at 504-506, 93 S.Ct. at 2801-2802; Marcus v. Search Warrant, supra, 367 U.S. at 731-32, 81 S.Ct. at 1715-1716.
> . . .

> Thus the arrests of defendants cannot be upheld, for they were all premised on the ad hoc obscenity determinations of police officers; nor can we approve seizures of evidence incident thereto." Id. at 1100-1101.

B.

The State argues that appellant is not constitutionally entitled to the remedies of suppression or dismissal because the magazines were purchased, not seized, and an illegal arrest does not void subsequent conviction. These same contentions were raised in Furuyama. The court answered that such a holding would impermissibly circumvent first amendment protections:

> "Still, we are instructed by the Court that '[c]onstitutional provisions for the security of person and property are to be liberally construed, and "it is the duty of courts to be watchful for the constitutional righs of the citizen, and against any stealthy encroachments thereon."' Byars v. United States, 273 U.S. 28, 32, 47 S.Ct. 248, 249, 71 L.Ed. 520 (1927) (citations omitted). Therefore, we are obliged to scrutinize the circumstances surrounding the transactions in the foregoing light to decide whether the enforcement practices in question were covered by the constitutional provisions regulating searches and seizures.

Though the State insisted the magazines were bought, the circuit court found the 'purchases' actually were 'preconceived seizures.' A review of the record convinces us that every aspect of the missions in search of pornography and its purveyors was prearranged, including the repossession of the money given in 'payment' for the evidence. Yet, an element essential to the validity of the seizures, judicial concurrence regarding the obscene nature of the evidence, was missing. And the failure to seek a judge's opinion on the obscenity vel non of the publications could not have been inadvertent. Viewing the transactions in their entirety, we also believe they were 'preconceived seizures,' designed in part to evade that phase of the warrant procedure whose specific purpose is the protection of first amendment freedoms.

What is particulary objectionable here is that the alleged purchase in every instance, as part of a single planned transaction, was immediately followed by a warrantless arrest and the seizure of the money given in exchange for the allegedly obscene matter. Such a transaction, in our opinion, could not have been a purchase; there was no intent to part with the money as in an ordinary sale. And the appropriation of the allegedly obscene material and tangible evidence of the transaction was tantamount to a warrantless seizure. While somewhat similar practices have been ratified in different contexts, see, e.g., Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed. 2d 312 (1966), first amendment considerations militate against the approval of transactions expressly

designed to evade specific warrant requirements governing the seizure of material arguably subject to constitutional protection.

* * *

We are unable to sanction the seizures of evidence here, for we would then be party to the nullification of a Court-decreed 'sensitive tool' to separate 'legitimate from illegitimate speech.' Speiser v. Randall, supra, 357 U.S. at 525, 78 S.Ct. at 1341-1342. An aspect of the warrant procedure tailored to protect first amendment freedoms could not have been meant for easy evasion with a modicum of ingenuity." Id at 1101-02.

But see Hildahl v. State, 536 P.2d 1298, 1301 (Okla. 1975); State v. Richardson, 506 S.W. 2d 488, 489 (Mo. 1974).

We agree that the protection afforded by the first amendment may not be circumvented by such artifice. Free expression is, by its nature, vulnerable to grossly damaging yet barely visible encroachments, and must be girded about by the most rigorous procedural safeguards. Bantam Books, Inc. v. Sullivan, supra, 372 U.S. at 66. To permit the police, as a rule, to follow the practice used in this case would elevate form over substance, effectively santioning an "end run" around those safeguards. Id. at 67; Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1353, 1360 (5th Cir.

1980). We hold, accordingly, that the officers constructively seized the magazines in contravention of the constitutionally mandated warrant procedure.

The proper remedy for such a warrantless seizure is to exclude from trial the evidence so acquired; this has the virtue of deterring such misconduct and ameliorating its chilling effect on free expression. State v. Furuyama, supra, 637 P.2d at 1104-05.

The Furuyama court did acknowledge, however, that warrantless arrests do not bar prosecution.

The general rule, followed almost unanimously in state and federal courts, is that illegal arrest does not void a subsequent conviction. United States v. Crews, 445 U.S. 463, 474 (1980); Gerstein v. Pugh, 420 U.S. 103, 119 (1975); Matthews v. State, 237 Md. 384, 387-88 (1965); Holiday News v. State, 53 Md. App. 344, 348-49 (1982); Hunt v. State, 601 P.2d 464, 466-67 (1979). See generally W.LaFave, Search and Seizure, §1.7(b) at 152-53 (1978); 5 Am.Jur.2d, Arrest §116 (1962); 22 C.J.S. Criminal Law, §144 (1961). But see United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

Appellant is not, however, left without a remedy for his unconstitutional arrest, as it furnishes an additional basis for exclusion of the magazines. The first amendment proscribes suppression of free expression even when publications are not seized in violation of the Fourth Amendment. In Bantam Books, Inc. v. Sullivan, supra, a government commission suppressed certain materials by informing distributors that it would recommend prosecution. The Court ruled that this intimidating practice was a system of informal censorship, violative of the first and fourteenth amendments. In Penthouse, Ltd., v. McAuliffe, supra, police investigators, in a concerted effort to discourage distribution of allegedly obscene materials, followed a procedure of purchasing magazines and examining their contents. If they thought a magazine was obscene, they would ask the retailer if he was aware of its contents. If he said yes, he was arrested without a warrant; if he said no, the officers would return the next day and arrest him without a warrant if the magazine was still being displayed. The publishers sought to enjoin this practice as violative of the first and fourteenth amendments. The government claimed that it did not "seize"

anything, since retailers and wholesalers, confronted with a campaign of warrantless arrests, "voluntarily" withdrew the publications from their shelves. The Fifth Circuit rejected this lame characterization:

> "[The State] was attempting to control items that are presumptively protected material because of the language of the First Amendment. . . . Therefore, a retailer or distributor of presumptively protected material must be afforded greater procedural safeguards before a seizure or 'constructive seizure' may take place. Roaden v. Kentucky, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973).

* * *

> It cannot be said that the retailers of the magazine in question 'voluntarily' removed the magazines from their shelves. As in Bantam Books, the procedure adopted . . . was a 'constructive seizure' and constituted a prior restraint." 610 F.2d at 1359, 1360.

The arrest in this case, moreover, forced appellant, who was the only employee in the store at that time, to usher out customers and close the store. Cf. State v. Huddleston, 412 A.2d 1148, 1158 (Del.Super. 1980) (arrest of only employee closed adult bookstore). For this reason, the arrest was more severely suppressive than the seizure of the two magazines, for it foreclosed public access as effectively as seizing all of the store's publications. The arrest thus

> "brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition. . . . Such precipitate action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards."

Roaden v. Kentucky, supra, 413 U.S. at 504; quoted in State v. Denten Corp., 288 Md. 178, 189-90 ("More fundamentally, the freedom from prior restraint rests not only on a personal right to express ideas, but also on the right of the public to have access to information and ideas.").

The courts must be especially vigilant in applying procedural safeguards to discourage government officials from stifling the exercise of first amendment rights. To permit the warrantless arrest in this case to go unremedied would merely license a continuation of this practice, circumventing the safeguards and denying the rights. To prevent such circumvention, we therefore hold that where, as here, law enforcement officers arrest a suspected distributor of obscene matter without a warrant authorizing seizure of either the distributor or the matter, the proper remedy is to

exclude evidence of the allegedly obscene matter acquired in connection with that arrest. [2]

Since the matter taken from the Silver News bookstore should have been excluded from appellant's trial and since without that material there would be insufficient evidence to convict, we reverse this conviction and direct that the charges be dismissed. Burks v. United States, 437 U.S. 1 (1978).

JUDGMENT REVERSED

COSTS TO BE PAID BY

PRINCE GEORGE'S COUNTY.

2 The holding in this case is limited to First Amendment rights and is not to be construed as a modification of traditional Fourth Amendment rulings.

84-778

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF MARYLAND,

Petitioner,

v.

BAXTER MACON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI

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The Daily Record Co., Baltimore, MD 21202

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CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment V:

> "No person shall be . . . deprived of life, liberty or property without due process of law. . . ."

United States Constitution, Amendment XIV:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES

Annotated Code of Maryland 1982 Repl. Vol., Article 27:

594B. Arrest by a police officer without warrant:

> "(a) A police officer may arrest without a warrant any person who commits, or attempts to commit, any felony or misdemeanor in the presence of, or within the view of, such officer.

> (b) A police officer may, when he has probable cause to believe that a felony or misdemeanor is being committed in his presence or within his view, arrest without a warrant any person whom he may reasonably believe to have committed such offense."

417 — Definitions:

As used in this subtitle,

> "(1) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.
>
> (2) 'Person' means any individual, partnership, firm, asociation, corporation, or other legal entity.
>
> (3) 'Distribute' means to transfer possession of, whether with or without consideration.
>
> (4) 'Knowingly' means having knowledge of the character and content of the subject matter.

418 — Sending or bringing into State for sale or distribution; publishing, etc., within State:

> "Any person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

RULES

Maryland Rules of Criminal Procedure, 4-324 (1984):

> (a) A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence.

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF MARYLAND,

Petitioner,

v.

BAXTER MACON,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI

STATEMENT OF FACTS

On May 6, 1981, Detectives Ray Evans and Roland B. Sweitzer, assigned to the Vice-Criminal and Narcotics Section of the Prince George's County Police Department, pursuant to an ongoing investigation of adult bookstores in Prince George's County, which resulted in approximately forty arrests and raids based on police officers' determination of obscenity, went to Silver News, an adult bookstore located at 2488 Chillum Road.

Detective Sweitzer instructed Detective Evans to enter the bookstore and look for material which he, Detective Evans, believed was obscene or would be deemed by the Courts to be obscene. Detective Evans in fact entered the bookstore and browsed through the material for approximately twenty minutes and then selected two magazines,

"Limited Edition" film Review No. Ten and "Diamond Collection" Number One. The windows of the store were covered with paper to a point above eye-level for a normal sized person so that most people could not see into the store. There were magazines on display on the walls almost from the ceiling to the floor. On the right side, empty packages of eight millimeter movies were displayed. In the back was a movie room where customers could view for a fee the movies which were offered for sale.

Detective Evans then approached Respondent, acting as the cashier, and presented the selected materials to him, and since he did not have a warrant for their seizure, he handed the cashier a fifty dollar bill so that he could retain possession of the magazines he had selected. He was charged twelve dollars and given change from the fifty dollar bill. Respondent placed the magazines in a brown paper bag, and Detective Evans exited the store for the purpose of having Detective Sweitzer view the magazines and make a determination that they were obscene. At this time, Detective Evans also intended to go back into the store and arrest the Respondent, retrieve the fifty dollar bill, and keep the magazines and the change.

Detective Sweitzer then viewed the magazines, determined that they were obscene, and then instructed Detective Evans to return to the store and arrest Respondent. Respondent was then placed under arrest, without a warrant. The fifty dollar bill used to "purchase" the package was removed from the store and thereafter retained by the officers in addition to the change received. No search warrant had been obtained by the detectives prior to the arrest of Respondent and the seizure of the materials. No judicial officer had viewed the material prior to the arrest and seizure to establish the existence of probable cause to believe that the material was obscene.

Trial was held before a jury on September 16, 1981 and following the testimony, arguments of counsel and instructions to the jury, and the Court, following the denial of Respondent's Motion For Judgment of Acquittal, submitted the case to the jury for their deliberation. The jury subsequently returned a verdict of guilty.

Respondent then filed a timely Motion For New Trial arguing both that there was no evidence of a crime for the prosecution to have begun, and there was no evidence at all of a crime for the case to be submitted to the jury. It was further argued that his conviction was based on a total lack of evidence, insufficient evidence, and errors of law. This Motion was denied. A timely appeal was then filed to the Court of Special Appeals resulting in the reversal of Respondent's conviction and a dismissal of the charging documents. The Petitioner filed a Motion For Reconsideration which was denied, and subsequently a Petition For Writ of Certiorari to the Court of Appeals of Maryland, which was also denied.

QUESTIONS PRESENTED

I. May a police officer make a warrantless arrest for a crime committed in his presence, i.e. sale of obscene material, and close the book store, requiring customers to leave, prior to determination of probable cause of obscenity by a neutral and detached judicial officer, without effecting a prior restraint?

II. Is the proper remedy suppression of evidence, as opposed to dismissal of the charges for lack of criminal jurisdiction, where the Respondent's arrest and prosecution under a statement of charges is solely based upon the purchase of materials that a police officer had concluded were obscene, but in fact, was neither contraband, evidence or an instrumentality of a crime at the time of the illegal purchase by virtue of the lack of prior judicial

determination of obscenity by a neutral and detached judicial officer?

III. Was reversal of the Respondent's conviction and dismissal of the charging document were a proper remedy for the Court of Special Appeals?

ARGUMENT

I.

A POLICE OFFICER MAY NOT MAKE A WARRANTLESS ARREST FOR A CRIME COMMITTED IN HIS PRESENCE, I.E. SALE OF OBSCENE MATTER, AND CLOSE DOWN THE BOOKSTORE REQUIRING CUSTOMERS TO LEAVE, PRIOR TO DETERMINATION OF PROBABLE CAUSE OF OBSCENITY BY A NEUTRAL AND DETACHED JUDICIAL OFFICER, WITHOUT EFFECTING A "PRIOR RESTRAINT ON FIRST AMENDMENT MATERIALS."

The instant Petition should be denied because the opinion of the Maryland Court of Special Appeals is in conformity with and does not conflict with the mandates of this Court in *Heller v. New York,* 413 U.S. 483, (1973); *Roaden v. Kentucky,* 413 U.S. 496, (1973); *A Quantity of Books v. Kansas,* 378 U.S. 205, 212 (1964), *Marcus v. Search Warrant,* 367 U.S. 717, 730, 731 (1961), and *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319 (1979).

Petitioner asks this Court to review the decision of the Court of Special Appeals of Maryland *suggesting* as one of its reasons, that, "the issue of whether or not the *purchase* of an allegedly obscene magazine by an undercover police officer constitutes probable cause for the officer to arrest the seller for distribution of obscene matter without a warrant," *is a question which has not been decided by this Court.* (emphasis supplied).

It is respectfully suggested that the "issue" as stated by Petitioner is on its face incorrect, as the *purchase* of an allegedly obscene magazine could not constitute *probable cause,* for the purchase in itself would not under the

present state of the law be considered prohibited criminal conduct under any existing obscenity Statute, State or Federal.

The better framing of the issue would be whether the "sale" of a magazine to an undercover police officer, who personally concludes the magazine is obscene, is sufficient probable cause for the police officer to believe a felony or a misdemeanor is being committed in his presence, or that an offense has actually been committed in his presence, in order that he may make an arrest without a warrant. *Roaden, supra.*

Petitioner expresses concern that the Maryland Court of Special Appeals has created, by judicial fiat, an exception to the Criminal Statute, Article 27, Sec. 594 B, of the Annotated Code of Maryland, that "a police officer can *never,* as a matter of law, have *probable cause* to arrest a person for distribution of obscene matter." Art. 27, *Ann. Code Md.,* Sec. 594 B (1984). This conception by Petitioner, to say the least, is misplaced and not true. Petitioner further argues that this result of the Court of Special Appeals was based on prior decisions of this Court which held that "a police officer *does not possess the requisite knowledge and sensitivity to seize* suspected obscene material without a warrant," citing *Roaden, supra, Heller, supra, Stanford v. Texas,* 379 U.S. 476, 506 (1965), *Zwicker v. Stanford Baily,* 436 U.S. 547, 564-65 (1918).

Petitioner has obviously *misread* or *misunderstood* the holdings of this Court in the aforementioned cases, because this Court has never held that a police officer "does not possess the requisite knowledge and sensitivity to seize suspected obscene material without a warrant." To the contrary, this Court has consistently held that a police officer *does not have the ability to make the initial probable cause determination of obscenity. Roaden, supra.*

Petitioner recognizes and accepts the requirement of prior judicial scrutiny prior to seizure of presumptively protected materials to avoid an unconstitutional "prior restraint." Yet, Petitioner argues that there is no reason to extend the requirement of judicial scrutiny prior to seizure of alleged obscene material, to the arrest of persons who distribute the material, *particularly when the mode of distribution is voluntary sale to undercover police officers,* since this does not involve prior restraint, *even in the instant case* when customers have been ushered out of the store, and the only employee is arrested and required to close the store.

However, the Petitioner correctly states that in finding the arrest in the instant case illegal, the Court of Special Appeals has held that a "necessary predicate" to seizure of a person, as well as the obscene matter he distributes, is prior judicial determination that there is probable cause to believe the matter is obscene. The Petitioner suggests that in support of this holding the Court below relied on three cases of dubious value: 1) *Penthouse International Ltd. v. McAuliffe,* 610 F.2d 1353 (5th Cir. 1980); 2) *Delta Book Distributors, Inc. v. Cronvich,* 304 F. Supp. 622, 667 (E.D. La. 1969); 3) *Hall v. State,* 229 S.E.2d 12 (Ga. 1976).

Again, Petitioner has misread and misunderstood the holding of the Court of Special Appeals. Much to the contrary, in answer to the question whether a judicial officer must decide that there is probable cause to believe *matter* is obscene before the matter or its *distributor* may be seized, the Court in the very beginning of its opinion under Section (A) relied on *Roth v. United States,* 354 U.S. 476, 485 (1956), *Speiser v. Randall,* 357 U.S. 513, 528 (1958), *Marcus v. Search Warrant,* 367 U.S. 717, 730, 731 (1961), *Bantam Books Inc. v. Sullivan,* 372 U.S. 58, 65 (1963), *A Quantity of Books v. Kansas,* 378 U.S. 205, 212 (1964), *Tyrone v. Wilkerson,* 410 F.2d 679, 641 (4th Circuit, 1969), *Europa Books v. Pomerleau,* 41 Md. App.

114, 121 (1979), *Lo-Ji Sales Inc. v. New York,* 442 U.S. 319 (1979), *Lee Art Theatre v. Virginia,* 396 U.S. 636 (1968), *Roaden v. Kentucky,* 413 U.S. 496 (1973), and *Heller, supra.* It is respectfully submitted that the aforementioned cases, which were relied upon by the Court of Special Appeals, are not to say the least, of dubious value. The Court of Special Appeals made clear that its holding was "*limited to First . nendment rights and was not to be construed as a modification of traditional Fourth Amendment rulings.*"

Petitioner cries out that the Court below has, by judicial fiat, created an exception that prohibits a police officer, as a matter of law, from ever having probable cause to arrest a person for distribution of obscene matter. This statement, Respondent respectfully suggests, is too narrowly presented, and it is not the present state of the law, as mandated by this Court or the Court below. What Petitioner refuses to accept is that this Court has recognized that "a State's power to suppress obscenity is limited by the Constitutional protection for free expression." *Marcus,* 367 U.S. at 731.

> "The line between speech unconditionally guaranteed and speech which may *legitimately* be regulated, suppressed or punished is finely drawn and the separation of *legitimate* from *illegitimate* speech calls for . . . sensitive tools . . .".

Speiser v. Randall, 337 U.S. at 525.

Petitioner also refuses to accept the fact that this Court has further mandated, under the Fifth and Fourteenth Amendment, that a State is not free to adopt whatever procedures it pleases for dealing with obscenity, and refuses to accept this Court's mandates that the setting of the bookstore and the commercial theatre are presumptively protected under the First Amendment. *Roaden, supra; Lo-Ji Sales, supra.*

Since Petitioner begins its Argument I with the statement that the sale of obscene matter is illegal in Maryland, it becomes very apparent why the State fails to understand the rulings of the Court below and the fact that the same are not in conflict with the decisions of this Honorable Court on the issue raised in Petitioner's Argument I. Petitioner has either misunderstood or failed to properly evaluate this Court's rulings on the following issues: (a) whether or not a police officer has the ability to make the initial determination of probable cause as to obscenity, (b) whether or not prior judicial scrutiny by a neutral and detached judicial officer is required before the arrest of one allegedly distributing obscene matter can be made, and (c) whether or not a warrant must be issued before the arrest of one allegedly distributing obscene matter can be made.

A detailed inspection of this Court's most recent obscenity rulings would have revealed to Petitioner the following:

(1) In *Heller, supra,* police officers viewed in part the film called "Blue Movie" in a theatre in the Greenwich Village area of New York City. On the basis of their observation and request, a judge purchased a ticket and viewed the entire film. At the end of the film, the judge signed a search warrant for the seizure of the film and three "John Doe" warrants for the arrest of the theatre manager, the projectionist and the ticket taker because, in his opinion, the film was obscene under the New York Penal Law during the time it was viewed. *Heller, supra.*

(2) In *Roaden, supra,* a Sheriff, accompanied by the District Prosecutor, purchased tickets to a local drive-in theatre and observed a film in its entirety, before concluding it was *obscene.* The Sheriff then proceeded to the projection room where he arrested the manager of the theatre, and seized one copy of the film. It was *uncontested*

that the Sheriff had no warrant when he made the *arrest,* there had been no prior determination by a judicial officer on the question of obscenity, and the arrest was based solely on the Sheriff's observing the exhibition of the film. However, it was admitted at trial by the Defendant that the film was obscene.

(3) A further evaluation of this Court's rulings reveals that the determination of probable cause as to what is "*contraband*" when the alleged contraband is a book, film or any tangible form of expression, *must* be made by a neutral and detached judicial officer, rather than solely by a police officer, because books, films and forms of expression are presumptively protected under the First Amendment, along with the setting in which distributed or exhibited. It is no answer just to say that obscene books are *contraband,* and that the standards governing arrests, searches and seizures of allegedly obscene books should not differ from those followed with respect to narcotics, gambling paraphernalia and other contraband. This proposition was rejected in *Marcus, supra.* The State, therefore, must follow a procedure that "focuses searchingly on the issue of obscenity " *eroding or lifting* that Constitutional presumption in order to establish probable cause to seize matter, or to arrest (seize) a person for distributing or exhibiting obscene matter. *Marcus, supra.* That procedure requires that the determination of probable cause of obscenity must be made by a neutral and detached judicial officer who can then issue a warrant for arrest and seizure. *Marcus, supra.* Had the Petitioner thoroughly digested this Honorable Court's opinions it would not have overlooked these important facts as revealed in *Heller, supra,* and *Roaden, supra,* bearing on the issue they raise in their *Argument I,* is, that both in *Heller* and *Roaden* there were *arrests* as well as *seizures* of matter alleged to be obscene. The *probable cause* was the same for the *arrests* as well as the *seizures,* the only

difference being that the *probable cause* determination of obscenity in *Heller* was made by a neutral and detached judicial officer who then issued the arrest and search and seizure warrants, as opposed to the probable cause determination in *Roaden, supra,* being made by a police officer who made the arrests and seizures without a warrant. When the State in *Roaden, supra,* argued to this Court that the arrests and seizures were valid because they were incident to a lawful arrest, this Court made it clear that the decision of *Ledesma v. Perez,* 304 F. Supp. 662 (Eastern District La., 1969) had not been followed. In that case, the Court clearly held improper *arrests* and *seizures,* without warrants, because there had been no prior judicial determination of probable cause of obscenity. That Court made clear that the fact that some materials were *purchased* rather than seized, is of no moment in light of the fact that there had been no prior judicial determination of probable cause of obscenity and no warrants had been issued. *Ledesma, supra.*

Petitioner continues to find comfort in its argument that the decisions in *Heller, Roaden* and other cases cited *Supra,* rested on a suppression issue, in violation of Fourth Amendment rights, and therefore concludes that this Court did not deal with the issue of whether a police officer can make the initial determination of probable cause of obscenity and arrest a distributor without a warrant for a crime committed in his presence. However, as described above, this Court has ultimately decided this issue in *Heller,* and *Roaden.*

It should seem clear to Petitioner that the uncontested facts in the instant case are similar if not almost identical to those faced by this Court in *Roaden, supra.* It is uncontested in the instant matter that (a) the police officer had no warrant when he made the arrest of the Respondent, (b) there had been no prior determination by a judicial officer on the question of obscenity and, (c) the

arrest was based solely on the police officer's observation and conclusion that the material was obscene. The only fact different in this case than in *Roaden, supra,* is that the Sheriff in *Roaden* purchased a ticket to view the film, and in this case, the police officer paid for the magazines he had selected with a fifty dollar bill which subsequent to the arrest, was seized without return of the change given to him by the Respondent which they still hold to-date and as a result have deprived the Respondent of property without due process of law, in violation of the Fifth and Fourteenth Amendment of the U.S. Constitution. U.S. Const. Amends. V, XIV.

If this Honorable Court concluded that the Sheriff in *Roaden, supra,* could not make the probable cause determination that the film he saw was *contraband,* and seize it without a warrant incident to a lawful arrest, then *a fortiori,* the police officer in the instant case could not make a similar determination that an offense (sale of obscene magazines) had actually been committed in his presence in order to arrest Respondent without a warrant. This is because at the time the alleged sale took place, in order for the officer to have the ability to make a warrantless arrest for an offense committed in his presence, he must have the *ability* to determine whether an offense has actually been committed. *Roaden, supra.* This he cannot do because in order for the officer to determine that the Respondent is selling obscene magazines, he must be able to make the probable cause determination that the magazine is obscene. *Roaden, supra,* and he cannot do this because at the time he selects and/or purchases the same there is a presumption that the setting in which it is sold and the magazine itself are protected under the First Amendment. *Roaden, supra.* And, until that presumption is *eroded* or *lifted* by some prior judicial scrutiny, the Respondent's conduct in selling such material cannot constitutionally be criminal, since no crime has been committed in the officer's presence.

Roaden, supra. Chief Justice Warren made a similar observation in his concurring opinion in *Roth, supra,* when he stated:

> "It is not the book that is on trial; it is a person. The conduct of the Defendant is the central issue, not the obscenity of a book or picture. The nature of the material is, of course, relevant as an attribute of the Defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting." 354 U.S. at 495.

If, then, the Respondent's conduct is judged upon the legal status of the material he sells at a time prior to the judicial *erosion* of this Constitutional presumption of protected expression, then he therefore cannot logically distribute, nor can the police purchase, *contraband. Roaden, supra.* Thus there is no crime committed in the officer's presence for which he can make a warrantless arrest. *Roaden, supra.*

This, then, is the spirit of this Court's conclusions in the cases, *supra,* which are in line with and not in conflict with the decision of the Court of Special Appeals of Maryland.

For these reasons the Petition should be denied.

II.

THE PROPER REMEDY IS DISMISSAL OF THE CHARGES FOR LACK OF CRIMINAL JURISDICTION WHERE THE RESPONDENT'S ARREST AND PROSECUTION UNDER A STATEMENT OF CHARGES IS SOLELY BASED UPON THE PURCHASE OF MATERIALS A POLICE OFFICER CONCLUDED WAS OBSCENE, BUT WHICH WAS NEITHER CONTRABAND, EVIDENCE, OR AN INSTRUMENTALITY OF A CRIME AT THE TIME OF THE ILLEGAL PURCHASE BY VIRTUE OF THE LACK OF PRIOR JUDICIAL DETERMINATION OF OBSCENITY BY A NEUTRAL AND DETACHED JUDICIAL OFFICER.

Petitioner suggests that "even if, assuming *arguendo,* the warrantless arrest of Respondent was illegal in this

instant case, the only remedy which Respondent was entitled to was suppression of any evidence obtained through exploitation of the illegal arrest."

Petitioner also suggests that the only evidence which should or could have been suppressed was the fifty dollar bill, since no other evidence was obtained by police as a fruit of Respondent's arrest.

Further, the Petitioner states that the Court of Special Appeals, in an attempt to punish police misconduct, went backwards in time to the sale of the magazines which occurred before the arrest, and termed it a "constructive seizure" in order to justify suppression of the magazines and provide Respondent with a meaningful remedy. Petitioner then argues that it is unaware of any prior holding of this Court which would support such mental gymnastics which it characterizes as "backward boot-strapping," a claim which is tantamount to the "pot calling the kettle black," as will be demonstrated further in Respondents argument herein.

A dissection of Petitioner's argument step by step is necessary to demonstrate Petitioner's misunderstanding and/or distortion of this Court's opinions to the facts in the instant case.

In *Roaden v. Kentucky, supra,* this Court, in an opinion delivered by Chief Justice Burger said *"The question presented in this case is whether the seizure of allegedly obscene material, contemporaneous with,* (emphasis supplied), *and as an incident to an arrest* (emphasis supplied) for the public exhibition of such material in a commercial theatre, *may be accomplished without a warrant."*

Obviously then, the ability to seize allegedly obscene material without a warrant as an incident to an arrest, *presupposes* the ability to constitutionally make an arrest

for a *crime* committed in the presence of the arresting officer. *Roaden, supra.*

This Court noted in *Roaden,* that the seizure of a film presents a very different situation from that in which *contraband* is changing hands, or where a robbery or assault is being perpetrated. *Roaden, supra.* In the latter settings, the *probable cause for an arrest* might justify the seizure of weapons, or other evidence or instruments of crime, without a warrant. *Roaden, supra.*

This Court has consistently held to the Constitutional proposition that a police officer cannot make a determination of obscenity, for this must be left to a neutral and detached judicial officer as in *Heller v. New York, supra.* Further, the standards governing arrests, searches and seizures for allegedly obscene material *must* differ from those applied with respect to *narcotics, gambling paraphernalia* and *other contraband. Marcus, supra.*

Moreover, this Court has made clear that the setting of the bookstore or the commercial theatre are presumptively under the protection for the First Amendment. *Roaden, supra.* It is for this latter reason that the Sheriff in *Roaden* was unable to seize an allegedly obscene film, incident to an alleged lawful arrest, without a warrant for a crime committed in the officers presence, i.e. — exhibition of an obscene film. *Roaden, supra.* And, it is for this reason that the Petitioner's Argument II must fail in its entirety when analyzed in light of these legal principles under the First, Fourth and Fourteenth Amendments. U.S. Const. Amends. I, IV, V and XIV.

Petitioner argues that no evidence was obtained through *exploitation* of the illegal arrest of the Respondent, other than the fifty dollar bill retrieved by the police from the register after the arrest, and the retention of the

change given by the Respondent. This argument, adjudged in light of the conclusions of this Court in *Roaden,* are frivolous to say the least. *Roaden, supra.*

Petitioner ironically complains that the Court of Special Appeals indulges in "bootstrapping," when in fact the Petitioner is *guilty* of the *same conduct.* It attempts to obtain magazines and the money initially paid for the alleged purchase along with change received as evidence of criminal conduct on the part of the Respondent to justify its arrest for the sale of allegedly obscene material. This dubious proposition cannot be sustained in light of *Roaden's* presumption of the setting and material being protected under the First Amendment until there is an *erosion* of the presumption by the judicial process of scrutiny by a neutral and detached judicial officer. *Roaden, supra; Heller, supra. The real question that must be asked and answered in connection with Petitioner's position is: "How can the material aliegedly purchased be considered evidence of an instrumentality of a crime at the time of the purchase and/or sale until a judicial officer makes a determination of obscenity, since the officer does not have the ability under the Constitution to make that determination."* The answer under *Roaden* and *Heller* is that such materials cannot be considered *evidence* or *instrumentalities* of a crime at the time of an alleged purchase and/or sale until there has been a prior judicial determination of probable cause. *Roaden, supra; Heller, supra.* That is why the Deputy Sheriff in *Roaden* could not make a warrantless seizure incident to a lawful arrest for a crime committed in his presence, because he did not have the ability to determine that a crime was actually committed in his presence. *Roaden, supra; Heller, supra.* In point of fact there was no crime of obscenity committed in his presence. *Roaden, supra; Heller, supra.* Why was there no crime committed in his presence? The reason

appears in the observation of Chief Justice Warren in his concurring opinion in *Roth*, when he stated:

> "There is more to these cases. It is not the book that is on trial; it is the person. The conduct of the Defendant is the central issue, not the obscenity of the book or picture." *Roth*, 354 U.S. at 495.

If we then judge the Respondent's conduct at the time of the alleged purchase in light of the legal status of the material prior to any judicial scrutiny, the presumption of protected expression in a protected setting continues and all that took place was an *orderly and lawful transfer of material* that was in the eyes of the law Constitutionally not either *contraband, evidence* or an *instrumentality* of criminal conduct. *Roaden, supra*. Yet, the Petitioner desires to "bootstrap" an anticipated subsequent finding of obscenity by a Court or jury to the Respondent's conduct at the time the police officer was attempting to gather evidence under the facade of a purchase. If, under *Roaden*, the magazines obtained by the police were presumptively protected, then the police within the boundaries of due process can not keep them as evidence along with the Respondent's money. *Roaden, supra*. They, therefore, cannot be evidence of a crime, because the Constitutional presumption has not been eroded and continues in favor of the Respondent's conduct. *Roaden, supra; Marcus, supra; Lo-Ji Sales, supra*. Therefore, the obtaining of the magazines under the circumstances, and their retention and use, was evidence obtained through *"exploitation"* of the illegal arrest of the Respondent without a warrant prior to any judicial determination of obscenity. *Roaden, supra; Heller, supra; Marcus, supra; Lo-Ji Sales, supra*.

Thus, if the evidence obtained is not evidence or an instrumentality of a crime, then it cannot constitute the basis for a charging document or a prosecution under the Due Process Clause and the prosecution fails before it is begun, *Goodman v. State of Maryland*, 173 Md. 1 (1942);

Morgan v. State of Maryland, 293 Md. 480 (1984). The relief from such an abuse of Due Process is dismissal of the "charging documents," as ordered by the Court of Special Appeals, "relief that justice requires under the circumstances." *Burks v. United States*, 437 U.S. 1, (1978). It is not the illegal arrest that bars the prosecution of the Respondent as the Petitioner argues, but the *insufficiency* and lack of *probative evidence* of a crime from the very inception that bars prosecution and deprives the trial court of its jurisdiction. *Burks, supra*. The problem with Petitioner's second argument is that it attempts to compare the obtaining of evidence in the instant case to that of an undercover agent purchasing *narcotics*, who usually retrieves money paid as evidence to be used as evidence at trial. *Roaden, supra*. Since narcotics are pure contraband, the officer has the ability to determine that a crime has been committed in his presence. *Roaden, supra*. He can therefore arrest the Defendant and make a seizure of evidence incidental to a lawful arrest. *Roaden, supra*. The evidence also includes the money paid for the narcotics. *Roaden, supra*. What Petitioner refuses to recognize is that this Court has consistently ruled that the procedures and standards governing arrests, searches and seizures of *narcotics* must differ from those applied to allegedly obscene materials. *Roaden, supra*.

For these reasons the taking of the magaznes and the money by the police at a time when, in the eyes of the law, they were presumptively protected under the First Amendment amounted to a taking of property without due process of law (a seizure). *Roaden, supra; Heller, supra;* U.S. Const. Amends. I, IV, V, XIV. This is why the Sheriff in *Roaden* could not take the film, and for that same reason, this is why the Petitioner's Argument II must fail. *Roaden, supra*.

The decision of the Court of Special Appeals is not a totally unwarranted extension of the Fourth Amendment

search and seizure law. It is an enforcement of the guarantee that a person will not have his property taken without due process of law, U.S. Const. Amends. IV, V, XIV. Nor will he be prosecuted without due process of law. U.S. Const. Amends. IV, V, XIV. It is a further guarantee that presumptively protected First Amendment material will not be taken out of circulation from the public and *"restrained"* as a result of a police officer's conclusion that it is obscene prior to a judicial determination of obscenity. *Roaden, supra; Lo-Ji Sales, supra.*

Petitioner also takes issue with the Court of Special Appeals' conclusion that the arrest of Respondent and the closing of the bookstore operated as "prior restraint." It attempts to create the impression that Respondent's arrest and the closing of the store was an isolated event, contrasting the same with *Penthouse International, Ltd. v. McAuliffe, supra,* where Petitioner admits that the arrests forced many book sellers to voluntarily withdraw certain publications from their shelves. *Penthouse, supra.* What Petitioner fails to reveal is that Respondent's warrantless arrest and the taking of presumptively protected material based on a police officer's conclusion of obscenity was part of a totality of forty arrests and raids as part of an overall scheme where each police officer made the determination of obscenity. The arrests of employees therefore, were, as in *Penthouse, supra,* a restraint of both the sale of presumptively protected material, and public access to the same. This resulted in the prior restraint recognized by the Court of Special Appeals, for in these instances as in *McAuliffe, supra,* "it was the police who attempted to be the censors of what could be available to the adult public," *Penthouse, supra.*

III.

REVERSAL OF THE RESPONDENT'S CONVICTION AND DISMISSAL OF THE CHARGING DOCUMENT WAS PROPER TO PROVIDE THAT RELIEF WHICH WOULD BE "JUST UNDER THE CIRCUMSTANCES."

Petitioner complains that the Court below was not content to merely suppress the evidence and reverse Respondent's conviction upon its finding that the magazines should have been excluded from the trial by granting the motion to dismiss, but undertook the additional unjustified step of ordering that the *charging document* be dismissed under this Court's holding in *Burks v. United States,* 437 U.S. 1 (1978).

Petitioner agrees that this Court's holding in *Burks, supra,* precludes a retrial for double jeopardy reasons in the event reversal is based on evidentiary insufficiency. But Petitioner argues that if reversal is in any way based on trial error, retrial should be required, and further, that the Appellate Court should not under *Burks, supra,* have the discretion to order any other relief. Yet, Petitioner acknowledges that retrial in such a case is not mandated by *Burks, supra.* On Page 30 of its Petition, the following phrase appears: "In holding that retrial to correct trial error is not Constitutionally *proscribed* by the Double Jeopardy Clause." It is apparent from this phrase that although retrial is not proscribed, *it is also not mandated.* This concept is fortified by the statement in *Burks:*

> "Moreover, as *Foreman,* 361 U.S. at 425, has indicated, an Appellate Court is authorized by Sec. 2106 to "go beyond the particular relief sought" in order to provide that relief which would be "just under the circumstances."

437 U.S. at 17-18.

Petitioner objects to the additional step taken by the Court of Special Appeals ordering that the charging

document be dismissed under this Court's holding in *Burks, supra*. Petitioner argues that the reversal should have been based on trial error as opposed to insufficient evidence suggesting that, if trial error is the basis of reversal, then under *Burks, supra,* retrial is *mandated*. A review of the facts in the instant case make it clear that Respondent's position during trial in their Motion To Dismiss, Motion For Judgment of Acquittal, and Motion For New Trial. was that there was insufficient evidence of criminal conduct to give the trial court criminal jurisdiction, and insufficient evidence of criminal conduct to allow the case to go to the jury for consideration, justifying a Judgment of Acquittal. Md. R. Crim. Proced. 4-324 (1984). Having found that there was insufficient evidence of probable cause to arrest and prosecute under the charging document under the First, Fifth and Fourteenth Amendments, the Court of Special Appeals, in part, based its reversal *on insufficiency of evidence*. Further, since the Statement of Charges was based on the police officer's determination of obscenity, the prosecution fails before it is begun. See *Goodman v. State, supra, Morgan, supra.* Since there was no prior judicial determination of obscenity, then the Respondent's *conduct* was protected under *Roaden, supra,* and there was insufficient evidence to go to the jury. In addition, since the Court of Special Appeals concluded this purchase was a constructive seizure of constitutionally protected material, not of contraband or evidence of a crime, it therefore recognized that it cannot be used as evidence during trial.

Therefore, in light of the Court of Special Appeals concluding (a) that there was insufficient evidence of criminal conduct, and (b) a warrantless constructive seizure occurred of presumptively protected First Amendment material which should have been excluded from the trial in light of the First, Fifth and Fourteenth Amendments, sufficient for a Judgment of Acquittal, the

Appellate Court was authorized under the *Burks, supra,* concept, to "go beyond the particular relief sought" in *Respondent's Appeal,* in order to provide that relief which would be *"just under the circumstances."* Therefore, what is just in the instant case is dismissal of the *charging document,* since it was not based on either probable cause, or evidence of a crime, *Goodman, supra.* Such a prosecution fails before it is begun, since the Respondent, under the theory of *Roaden, supra,* as a matter of law did not engage in criminal conduct. *Goodman, supra.* Thus, the trial court did not have criminal jurisdiction under the Due Process Clause, and as a result of which the prosecution fails before it is begun, thus forming the basis for dismissal of the charging document, in order to provide that relief under *Burks, supra,* which would be *"just under the circumstances."*

Petitioner petitions the Court for the opportunity to attempt to prove the alleged sale of obscene magazines without the use of magazines as evidence, a task it well knows impossible in light of the requirements mandated by this Court in *Miller v. California,* 413 U.S. 15 (1972). Petitioner argues that Appellate Courts should simply not be allowed to decide on the basis of the Appellate record before them, which may not involve all of the evidence that the State has available to it, whether or not a case can proceed on retrial without the admission of illegally obtained evidence. Such an argument flies in the face of reality in light of *Miller, supra,* which requires consideration of the specific material as a whole by the trier of facts. In spite of the fact that retrial is not mandated by *Burks, supra,* and that *Burks* acknowledges that Appellate Courts are authorized to "go beyond the particular relief sought" in order to provide that relief which would be "just under the circumstances," Petitioner suggests that this Court overturn its holding in *Burks* and deprive the Court of Special Appeals of its discretionary authority, in order

to avoid the "stigma" of its holding, which is simply limited to First Amendment rights and not a modification of traditional Fourth Amendment rulings.

In addition, Petitioner's argument that a case may proceed to trial on illegally obtained evidence, is without merit as the evidence although illegally obtained, must be evidence of a crime and in the instant case, it is not.

Therefore, for the purposes of argument it makes no difference whether the alleged purchase is viewed as a "constructive seizure," since the material obtained under the theory of *Roaden, supra; Marcus, supra; Heller, supra; Lo-Ji, supra,* was not *evidence* of a crime at the time of the purchase. As a result such evidence has no probative relevant value and should not have been allowed into evidence, because to do so would result in First, Fourth, Fifth and Fourteenth Amendment violations. U.S. Const. Amends. I, IV, V, XIV.

Thus, the material obtained should have been excluded from evidence by granting the Respondent's pretrial Motion to Dismiss because the trial Court lacked criminal jurisdiction on the basis that there was no evidence of a crime or criminal conduct constitutionally available to allow the trial to proceed under due process. Const. Amends. I, IV, V, XIV.

CONCLUSION

Petitioner expresses grave concern that the Court of Special Appeals holding is contrary to all established American law and that a police officer can never as a matter of law ever have probable cause to arrest a person without a warrant for the distribution of obscene matter. This concern is overstated in light of this Court's long line of obscenity holdings and the opinion of the Court of Special Appeals (which is not in conflict with this Court's decisions on the issues Petitioner is concerned with.)

Petitioner asks this Court to decide issues it has already dealt with in *Heller, supra; Roaden, supra; Marcus, supra;* and *A Quantity of Books v. Kansas, supra.* Petitioner's concerns should be put to rest as this Honorable Court has already decided that: (a) a police officer cannot make an *ad hoc* determination of obscenity; (b) he cannot make an arrest without a warrant for the crime of obscenity committed in his presence; and (c) there must be prior judicial scrutiny by a neutral and detached judicial officer that material is obscene, which gives rise to probable cause for an arrest, and search and seizure warrant to be issued as the vehicle to allow a police officer to make an arrest and seizure in light of the First, Fourth, Fifth and Fourteenth Amendments.

This therefore is the method by which an officer must obtain probable cause in light of the First, Fourth, Fifth and Fourteenth Amendments, and is distinctly different than that involving narcotics, or other types of *contraband.* Since the material in this instant case was never validly obtained, it legally and presumptively does not represent evidence or instrumentalities of a crime which could be used to initiate or start a prosecution against the Respondent in light of First, Fifth and Fourteenth Amendments. Therefore, this is the justification for reversal and dismissal. It is respectfully submitted that the Petition For Writ of Certiorari be denied.

Respectfully submitted,

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No. 84-778 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF MARYLAND,

Petitioner,

v.

BAXTER MACON,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 14, 1984
CERTIORARI GRANTED JANUARY 14, 1985

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JOINT APPENDIX

CHRONOLOGY

Date	Proceeding
May 6, 1981 Approximately 7:20 p.m.	Arrest.
May 6, 1981 By 10:15 p.m.	Charged in District Court. Released on own recognizance.
May 12, 1981	Preliminary inquiry - jury trial prayed - case transferred to Circuit Court.

August 7, 1981	Respondent's Motion to Suppress.
August 7, 1981	Respondent's Motion to Dismiss.
August 18, 1981	Respondent's Memorandum in Support of Motions to Suppress and Dismiss.
August 28, 1981	State's Opposition to Motions to Suppress and Dismiss.
September 1, 2, 15, 1981	Hearings on Motions to Suppress and Dismiss.
September 15, 1981	Denial of Motions.
September 16, 1981	Hearing on and denial of Motion to Reconsider Ruling on Motions.
September 16, 17, 18, 21, 1981	Trial.
January 25, 1983	Sentencing.
February 7, 1983	Order for Appeal.
March 7, 1984	Opinion of the Court of Special Appeals.
April 2, 1984	State's Motion for Reconsideration and Stay of Mandate.
May 3, 1984	Motion denied.
May 4, 1984	Mandate issued.

May 21, 1984	State's Petition for Writ of Certiorari filed in Court of Appeals.
September 14, 1984	Petition denied.
November 14, 1984	State's Petition for Writ of Certiorari filed in United States Supreme Court.
January 14, 1985	Certiorari granted.

WHAT MAY BE FOUND IN THE APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

PLEADINGS

(Title Omitted)

MOTION TO SUPPRESS EVIDENCE

(Filed August 7, 1981)

The Defendant, through undersigned counsel, moves this Court to suppress any and all evidence to be used at this trial on the following grounds:

1. That the evidence secured is not in violation of Article 27, Section 418, et seq.

2. That the distribution alleged in the Statement of Charges was a permissive distribution under Article 27, Section 418 et seq., and was not criminal in nature and the evidence secured and intended to be used at this trial is not proper evidence to be used against the Defendant, for to do so, would deny him due process of law and equal protection of the laws in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

3. That the evidence was unlawfully obtained.

4. Further grounds for the suppression of the evidence will be developed at the time of the hearing of this Motion.

WHEREFORE, the Defendant respectfully requests that this Court suppress any and all evidence to be used in the trial of this matter.

(Signatures and Certificate of Service omitted).

(Title Omitted)

MOTION TO DISMISS

(Filed August 7, 1981)

The Defendant, through undersigned counsel, moves the Court for an order dismissing the case against the Defendant and as grounds for said Motion states the following:

I.

The State's Attorney for Prince George's County, pursuant to a Statement of Charges, has instituted a criminal proceeding charging the Defendant with violation of Article 27, Section 418.

1. The Statement of Charges is vague and insufficient as a matter of law in that it fails to set forth with sufficient specificity the charges of which the Defendant stands accused.

2. The statutory provisions of Article 27, Section 418, under which the State is proceeding, is, as written, repugnant to the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the

United States because:

(a) Said statutory provisions are void for vagueness in that the same forbid or require the doing of an act in terms so vague, fluid and indefinite that men of common intelligence must necessarily guess at the meaning and differ as to the application thereof, and as such, are repugnant to the due process provisions of the First, Fifth and Fourteenth Amendments to the Constitution of the United States; and further,

(b) Said statutory provisions are void for overbreadth by means which sweep unnecesarily broadly and therby invade the area of protected freedoms in that the statute sets forth no standards for determining and regulating obscenity and thus are insufficient for those minimum standards proscribed by the United States Supreme Court in connection with speech and communications, presumptively protected under the First Amendment and Fourteenth Amendment; and further,

(c) The said statutory provisions are void for vagueness and impermissible overbreadth, in the area of First Amendment freedoms, because the said provisions are susceptible of sweeping and improper application by law enforcement officials and have a "chilling and inhibiting effect" on the exercise of the Federal Constitutional rights of citizens of the State of Maryland and the United States, as well as the Defendant, in the area of the First Amendment; and further,

(d) Said statutory provisions are repugnant to the substantive due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution because they permit deprivation of liberty and/or property rights and interests for the exercise of First Amendment rights by unreasonable, arbitrary and capricious means by law enforcement officials of the State of Maryland without a showing of a real and substantial relationship to any state's relationship to any state's subordinating interest which

is compelling to justify state action limiting First Amendment freedoms; and further,

(e) Said statutory provisions are impermissibly broad and repugnant to the procedural due process requirements of the Fifth and Fourteenth Amendments to the Constitution of the United States by employing means lacking adequate safeguards which the due process demands to assure protected matter the constitutional protection of the First Amendment to which it is entitled.

The statutory provisions of Article 27, Section 418 are clearly repugnant to the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States as said provisions have been applied, construed and are being applied and construed by the State's Attorney and/or law enforcement officials in the following respects:

(a) That in the application of said statute, the said law enforcement officials did not have available the necessary probable cause necessary for the

issuance of the Statement of Charges.

3. That the Defendant was arrested falsely and without probable cause as the charging document does not set forth facts sufficient to establish criminal activity on the part of the Defendant.

4. That Article 27, Section 418 is void for vagueness and overbreadth.

II.

It is, therefore, respectfully submitted that the prosecution in the case at bar is brought in bad faith for the purpose of harassment and that the statute under which the State is proceeding, is void for vagueness, overbreadth and is [u]nconstitutional on its face and is being unconstitutionally applied to the Defendant.

WHEREFORE, the Defendant prays that the case be dismissed.

(Signatures and Certificate of Service omitted).

(Title Omitted)

CONSOLIDATED MEMORANDUM IN SUPPORT OF MOTIONS TO DISMISS AND MOTIONS TO SUPPRESS

(Filed August 18, 1981)

Defendants' attorney herein respectfully submits to this Honorable Court this Consolidated Memorandum in Support of Motions to Dismiss and Motions to Suppress heretofore filed with this Honorable Court.

* * * *

(factual allegations about other defendants omitted)

On or about May 6, 1981 at approximately 8:00 a.m. Detective Ray Evans, #884, entered the Silver News Bookstore and selected two magazines for purchase. Detective Evans then handed Defendant Baxter Jillispi Macon, employed therein, a $50 bill as purchase money for the magazines. Detective Evans took the magazines and an unspecified amount of money as change from the alleged purchase and left the store.

Five minutes after this purchase, Detective

Evans and two unnamed police officers, all employed by Prince George's County, Maryland and acting under color of state law, entered the Silver News Bookstore.

Officers demanded that the customers therein present identification and then expelled customers from the store.

Officers then demanded that Defendant Macon return and took a $50 bill allegedly used to purchase the two magazines, retaining monies delivered by Defendant Macon to Detective Evans as change from the alleged magazine purchase.

Officers ordered Defendant Macon to close the store, handcuffed Defendant Macon, and demanded that he accompany the officers. Defendant Macon was taken to the Bowie police station where he was photographed and finger printed. Additionally, Defendant was taken to a hallway in the police station where he was separately photographed by an unnamed police officer with a small instamatic camera.

Afterward, Defendant Macon was interrogated

by a vice squad officer who read from the list of questions pertaining to Defendant's place of employment. Defendant was never advised of his rights.

Defendant was then taken to the Upper Marlboro police station where he appeared before a bail commissioner who released Plaintiff on his own recognizance.

* * * *

(factual allegations about other defendants omitted)

I.

CHARGES FOR SALE OF OBSCENITY MUST BE DISMISSED WHERE MAGISTRATE DID NOT VIEW MATERIAL ALLEGED TO BE OBSCENE BEFORE CHARGING DEFENDANTS.

In Heller v. New York, 413 U.S. 483, 93 S.Ct. 2789 (1973) a judge of the New York Criminal Court signed a search warrant for the seizure of film and three "John Doe" warrants for the arrest of the theater manager, the projectionist and the ticket taker, respectively, for violating obscenity laws of the

State of New York, as codified in New York Penal Law §235.05, McKinney's Consol. Laws, c.40.

Before signing the arrest and search warrants, the judge viewed the film, supra at 485. However, the judge did not hold a prior adversary hearing on the question of the film's obscenity before signing the orders. Id. The Supreme Court explicitly held that a "prior adversary hearing would not be necessary in all cases where allegedly obscene material is seized [or people are arrested for violating obscenity laws." Supra, at 489.

However, the Court did not go so far as to hold that a judge could issue a probable cause warrant without at least viewing the allegedly obscene material. Citing Lee Art Theater v. Virginia, 392 U.S. 636, 637, 88 S.Ct. 2103, 2104 (1968), the Court acknowledged that the question of whether a judge must "[view] the motion picture before issuing a probable cause warrant . . . " was "open". Supra at 488. Indeed, in a footnote to this point, the Court

stated that "[i]t is true that a judge may read a copy of a book in courtroom or chambers but not as easily arrange to see a motion picture there." Supra at 488 n.4, clearly suggesting that a "neutral and detached magistrate" must dutifully make "an independent judicial determination" of printed matter's probable obscenity "prior to issuing the warrant." Supra at 489, Marcus v. Search Warrants, 367 U.S. 717, 731-733 (1961).

Other cases interpreting the holding of Heller have likewise held that no prior adversarial hearing was absolutely necessary in all obscenity cases involving search or arrest warrants. State v. Combs, 536 P.2d 1301 (1974), Hudahl v. State, 536 P.2d 1293 (1975). People v. Peters, 368 N.Y.S.2d 753 (1975).

However, most, if not all of the same courts, have mandated that a magistrate "[receive] evidence and [view] sample copies of the allegedly obscene material" prior to the issuance of any warrant. State v. Combs, 536 P.2d at 1303. Other courts, confronted

with warrants issued after a magistrate viewed the objectionable material, have been careful to state only that no "prior adversarial hearing" was required, implicitly approving of the careful judicial scrutiny given the materials for a probable cause determination of obscenity prior to the issuance of warrants. Hudahl v. State, 536 P.2d at 1295.

One court explicitly held that no prior judicial scrutiny was necessary prior to the indictment and arrest of a defendant for alleged violations of obscenity laws, provided the allegedly obscene materials were brought before a grand jury and the defendants were indicted there prior to their arrest. People v. Peters, 368 N.Y.S.2d at 758. In a footno[t]e, the court added that "the grand jury proceeding afforded the defendant at least the equivalent of the safeguards of an 'ex parte' probable cause hearing before magistrate in focusing searchingly on the question of obscenity." Supra at 758 n.2.

Thus, all courts interpreting the Supreme Court

holding in Heller, have agreed that some type of judicial or impartial scrutiny of allegedly obscene materials for a probable cause determination of obscenity by someone other than a law enforcement officer was necessary prior to the issuance of arrest warrants for those distributing the allegedly obscene materials in question.

> "The procedure under which the warrant issued solely upon the conclusory assertions of the police officer without assertions of the police officer without any inquiry by the justice of the peace into the factual basis of the officer's conclusions was not a procedure 'designed to focus searchingly on the question of obscenity', Marcus v. Search Warrants, 367 U.S. at 732 (1961) and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression. See Freedman v. Maryland, 380 U.S. 51, 58-59 (1964)."

Heller v. New York, 413 U.S. at 488 n.4.

In conclusion, any arrest and criminal prosecution of any herein named defendant not founded upon an arrest warrant secured through a

probable cause determination of the questioned material's obscenity by an impartial judicial magistrate who refused to rely on the "conclusory assertions of the police officer" seeking the arrest must be dismissed as effecting an illegal and unconstitutional "prior restraint" on the defendant's right to freedom of expression. Supra at 488.

II.

CHARGES FOR SALE OF OBSCENITY AMOUNTING TO A CAMPAIGN AGAINST SELLERS OF "ADULT" PRINTED MATERIAL EFFECT A PRIOR RESTRAINT OF DEFENDANTS' FIRST AMENDMENT RIGHTS, AND MUST BE DISMISSED.

In United States v. Thirty-Seven Photographs, 402 U.S. 363, 91 S.Ct. 1400 (1971), the Supreme Court held that "because only a judicial determination in an adversary proceeding ensures the necessary freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." 402 U.S. at 367, see; Freedman v. Maryland, 380 U.S. 51 (1965), Heller v. New York, 413 U.S. 483, 489 (1973).

Where purchase-arrest procedures are employed as part of a campaign to close down stores selling alleged pornography or severly curtail the amount of alleged pornography sold in those stores, a prior or final restraint of the type envisioned in United States v. Thirty-Seven Photographs has been effected. Unsanctioned by any order emitting from an adversary hearing prior to the arrests of the defendants and the effecting of this prior restraint on the right to free expression, charges brought against the defendants which have effected this prior restraint must be dismissed.

In Penthouse International, Ltd. v. McAuliffe, 436 F.Supp. 1241 (1977), cert. dismissed 447 U.S. 931 (1981), defendants in a state obscenity action against them complained to a federal court of "repeated arrests, repreated visits to retailers and threatening comments in the press [that erected] a system of prior restraint which was as insidious and effective as if the subject publications had been seized by authorities for

the purpose of destruction." Supra. at 1244. Specifically, local enforcement officers made six warrantless arrests and one warranted arrest of defendants for allegedly selling obscene materials. No magazines were confiscated. Significantly, the court highlighted the purchase-arrest scenario with statements appartently made by Solicitor McAuliffe to local newspapers. Mr. McAuliffe was quoted as saying he would "get whoever sold obscene magazines and the[y] [would] go to jail." Mr. McAuliffe was also quoted as saying that his obscenity campaign was "working because officers checking for obscene magazines haven't found anything in violation of the laws. . ." after the campaign was initiated.

In deciding that a "prior restraint" had been illegally imposed upon the defendants, the court succintly [sic] stated that "numerous and harassing arrests with or without a warrant prior to a final adjudication upon the issue of obscenity vel non at an adversary hearing constitutes a prior restraint

violative of the First and Fourteenth Amendments to the United States Constitution." Supra at 1256. The court did not go so far as to require an adversary hearing before any arrests were made. Supra. at 1255. However, in the context of repeated arrests and threatening statements resulting in a "prior restraint", an adversary hearing on the issue of obscenity prior to the campaign of arrests was necessary. Supra at 1256.

In the case at bar, there have been, not six, but over forty arrests. Exhibit 3. There have been numerous statements to the local press revealing an intent on the part of the law enforcement officers to close down the adult bookstores of Prince George's County. Exhibits 2, 4. Finally, there have been bookstore closings made pursuant to the arrests and the harassing of customers in the store. Statement of Facts. All of these acts have not only effected unwarranted harassment upon distributors of goods that are presumptively protected under the First Amendment to the United States Constitution, Cinema

Classics Limited v. Burch, 339 F.Supp. 43 (C.D. Cal. 1972) aff'd 409 U.S. 807, but have infringed upon the right of public access to information. Firestone v. Time, Inc., 460 F.2d 712 (5th Cir. 1972), cert denied 409 U.S. 875, Blount v. Rizzi, 400 U.S. 410 (1971).

As in McAuliffe, the state enforcement action, effecting a prior restraint, as embodied in the bringing of criminal charges against the defendants herein, must be permanently suspended by a dismissal of these charges.

III.

EVIDENCE TAKEN UNDER FALSE PRETENSE OF PURCHASE IS ILLEGALLY AND CRIMINALLY SEIZED AND CANNOT BE INTRODUCED AS EVIDENCE AGAINST DEFENDANTS WHERE EITHER STOLEN OR SEIZED IN VIOLATION OF DEFENDANTS' FIFTH AMENDMENT RIGHTS.

In nearly every purchase-arrest case, police officers have confiscated the purchase money from the defendants after placing them under arrest. It is evident from these facts that police officers never intended to let the defendants keep the money in

exchange for the magazines or films allegedly purchased, but rather intended to deceive the defendants into surrendering the magazines or films from their possession in exchange for money which the officers intended to retrieve. The officers, thus, came into possession of these magazines or films by misrepresenting an exchange of money for goods.

The crime of false pretenses, now merged into the crime of theft, Md. Annotated Code Art. 27, §341, is a false representation of an existing fact made with the intent to defraud, such representation operating as a deception inducing the transfer of money or other thing of value, and the taking of such money or valuable thing by the person committing the fraud to the loss of another. Willis v. State, 205 Md. 118, 106 A.2d 85 (1954). Maryland Law Encyclopedia, §1. Full ownership of the property by the person from whom it is taken is not necessary to sustain a charge of false pretenses. Deibert v. State, 150 Md. 687, 133 A. 847 (1926).

The State now seeks to have this evidence, taken criminally, introduced against the defendants as the basis for prosecution for the sale of alleged obscenity. This court cannot sanction the introduction of evidence, taken illegally, against defendants in a criminal trial.

At best, this evidence has been illegally seized from the defendants without any warrant or court sanction. Thus, the defendants have been compelled to surrender evidence, without a hearing. That will result in their prosecution.

The Fifth Amendment generally protects individuals from coercion to prove a charge against themselves "out of [their] own mouth." Malloy v. Hogan, 378 U.S. 1, 8 (1963).

The Fifth Amendment applies to the production of documents, as well as to testimony.

> "[U]nreasonable searches and seizures condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and

> compelling a man in a criminal case to be a witness against himself which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure. . ." And we have been unable to perceive that the seizure of a man's private books and papers to be used against him is substantially different from compelling him to be a witness against himself." Boyd v. United States, 116 U.S. 616, 663.

While a corporation has no Fifth Amendment rights, Oklahoma Press Publishing Co. v. Wallings, 329 U.S. 186 (1946), the state cannot require the production by a person of private books and records that would incriminate him. U.S. v. Dionisio, 410 U.S. 1, 12 (1972).

Wherefore, Defendants should be allowed to assert Fifth Amendment rights not to present books or records that would incriminate Defendants. Likewise, Defendants cannot be compelled to produce books or records that would lead to prosecution or lead to other evidence used in prosecution of Defendants. Kastigar v. U.S., 406 U.S. 441, 453 (1972).

(Signatures, Certificate of Service and newspaper

article exhibits omitted).

(Title Omitted)

STATE'S OPPOSITION TO MOTION TO SUPPRESS AND MOTION TO DISMISS

(Filed August 28, 1981)

Comes now the State of Maryland, by and through Arthur A. Marshall, Jr., State's Attorney for Prince George's County, and requests this Honorable Court to deny the defendant's Motion to Dismiss and Motion to Suppress Evidence, and for reasons states as follows:

I.

CHARGING DOCUMENT MAY NOT BE DISMISSED UPON A FINDING OF LESS THAN PROBABLE CAUSE IN APPLICATION FOR STATEMENT OF CHARGES.

The State submits that more than sufficient probable cause can be found as to each application for statement of charges. However, the issue which the

defendants raise (i.e., lack of probable cause) would not, even if established, mandate or permit this Honorable Court to dismiss the charging documents before it.

In Schaefer v. State, 31 Md. App. 437 (1978), the issue before the Court of Special Appeals was whether a defendant's motion to dismiss a charging document should have been granted because the sworn application for charges allegedly contained facts insufficient to create probable cause. The Court, after finding that sufficient probable cause in fact existed, went on to stress in footnote 5, that:

> "We do not imply by our holding that such a motion would have been proper had probable cause not been established. We do not raise [sic, reach] the question whether a defendant may be tried upon an arrest warrant or summons issued on less than probable cause shown in the application. Neither statute nor rule of this jurisdiction prohibits the trial of the defendant under an arrest warrant, or summons to a defendant, which is issued without probable cause."

Thus, the Court in Shaefer, made it abundantly clear that a negative inference was not being

established by the Court not first ruling on the issue of whether a charging document may or may not be dismissed where the application does not establish probable cause. Indeed, the Court makes it clear that such a dismissal more than likely would be impermissable as no statute or rule justifies such action.

II.

COMMISSIONER MAY DETERMINE PROBABLE CAUSE WITH OR WITHOUT PERSONAL VIEWING OF MATERIAL ALLEGED OBSCENE.

In each of the cases before this Court, the applications for statements of charges contain more than simple conclusory assertions, but also explicit descriptions of the obscene material in question. It is well settled in the law that probable cause may be established and a warrant properly issued where the affiant has personal or even hearsay knowledge of the facts which he has sworn to be true to the best of his knowledge and belief, see: Shaefer, supra p. 444. The Court in Shaefer went on to further address the issue

of probable cause as follows:

> "The quantum of required probable cause is the same to justify the issuance of a search and seizure warrant or an arrest warrant or a summons to a defendant. See Aguilar v. Texas, 378 U.S. 108, 112, n.3 (1964) . . . Dawson v. State, 11 Md. App. 694, 697, n.1 (1971), cert. den., 263 Md. 711 and 712 (1971). The Court of Appeals said in Edwardsen v. State, 243 Md. 131, 136 (1966): 'The rule of probable cause is a non-technical conception of a reasonable ground for belief of guilt, requiring less evidence for such belief than would justify conviction but more evidence than that which could arouse mere suspicion.' . . . Probable cause is less than certainty or demonstration but more than suspicion or possibility. It is to be determined by the judicial officer to whom application for the summons or warrant is made. If a prudent and cautious man would be justified from the facts presented in believing that the offense has been committed and the accused committed it, the summons or warrant may be properly issued . . .The sworn facts should be interpreted in a common-sense rather than a hyper-technical manner. Probable cause, however, may not be made out by statements which are purely conclusory, stating only the affiant's or an informant's belief that probable cause exists," Shaefer, supra. 443-444.

The function of a commissioner does not change where he is requested to issue a charging document for a violation of obscenity laws, specifically here, Art. 27

Sec. 418. As an arm of the Judicial branch of government, District Court Commissioners are obliged to: "conduct investigations and inquiries into the circumstances of any matter presented to him in order to determine if probable cause exists for the issuance of a charging document, warrant or criminal summons." C.T. 2-607. The question and method for determining probable cause does not change or alter where obscene matter is involved.

III.

ACTION BY POLICE OFFICERS DID NOT OPERATE AS A PRIOR RESTRAINT OF EXPRESSION.

In each case before this Court there was a determination made by an independent, neutral and detached magistrate, that probable cause existed to charge the defendants with crimes of distributing obscene matter. In fact, in all but four cases before the Court, the defendants were not arrested prior to the issuance of an arrest warrant. This form of judicial review removes the doubt of any possible prior

restraint of first amendment rights by law enforcement officials. Moreover, the United States Supreme Court, in Heller v. New York, 413 U.S. 483, 93 S.Ct. 2789 (1973) and later in New York Feed Co. v. Leary, 305 F.Supp. 288 (S.D.N.Y. 1969) has held that an adversary hearing on the issue of obscenity prior to an arrest is not required.

IV.

NO EVIDENCE WAS SEIZED BY POLICE OFFICERS IN VIOLATION OF DEFENDANTS RIGHTS.

Defendants allege that police officers who purchased alleged obscene material, and who then reviewed this material in its entirety, and who then effected the arrest of a defendant, based upon the probable cause shown in each application for charges, have committed the crime of theft (Art. 27 Sec. 342). To propose that police officers who engage in the collection of evidence of a crime are thieves is to say the State has no right to obtain evidence of a crime. Such a notion defies the basic foundations of our

criminal laws and the right and duty of the State to enforce them.

The defendants further argue that the purchase of obscene material by police officers amounted to compelling testimony from the defendants, in violation of their Fifth Amendment rights.

There is no basis in fact or law to show that a purchase of obscene matter and retrieving the monies used therefore, in any way amounts to the compulsion of testimony from a defendant. In fact, evidence such as is before the Court could not, under any circumstances amount to "private books and papers," and thus become testimonial, such as described in Boyd v. United States, 116 U.S. 616 (1886) and relied upon by the defendants as authority.

WHEREFORE, the State prays this Honorable Court to deny the defendant's Motion to Dismiss the Charging Documents and Suppress Evidence.

(Signature and Certificate of Service omitted).

TRANSCRIPTS

TESTIMONY AT MOTIONS HEARING

September 2, 1981 - M2. 8 - 15

R.B. SWEITZER, JR.,

a witness produced on call of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SANDLER:

Q. Officer Sweitzer, you are a member of the Prince George's County Police Department?

A. Yes, sir.

Q. In what capacity are you a member?

A. Detective with the Vice-Criminal Intelligence Section.

Q. On May 6, 1981, were you affiliated with the Prince George's County Police Department?

A. Yes, sir.

Q. In what capacity?

A. I was a detective in the Vice-Criminal Intelligence Section.

Q. Did you have an opportunity on May 6, 1981, to be in a bookstore known as Silver News, Inc., 2488 Chillum Road, Hyattsville?

A. Yes, sir.

Q. Can you tell the Court if you can recall approximately what time you were in that bookstore and the reason for your being there?

A. I was in the bookstore approximately 7:20 p.m. and I went in to arrest Mr. Macon.

Q. At 7:20 p.m. you went in to arrest a Mr. Macon?

A. Yes, sir, a clerk in the store. I ascertained his name after arrest.

Q. You ascertained his name after the arrest?

A. Yes, sir.

Q. He was the clerk. Now, could you tell the

Court why you went into the store at 7:20 p.m. to arrest the clerk?

A. Officer Evans is the officer who made a purchase of two magazines and brought the magazines to me. I was waiting outside. I reviewed the magazines and at that time entered the store and placed the clerk under arrest for the distribution of obscene material.

Q. At the time that Officer Evans purchased the magazines, you were not in the store?

A. No, sir.

Q. When he brought the two magazines that he purchased to you, what condition were they in?

A. I am not sure.

Q. If I were to tell you that they were sealed in plastic, would that —

A. It would be very possible.

Q. Do you recall having to open the plastic in order to look at the magazines?

A. No, sir, I don't. I don't recall having

opened the plastic.

Q. Do you have some recollection that they were in plastic?

A. I have no doubt specifically, but magazines of that type are usually in plastic.

Q. Would it be fair to assume these magazines were in plastic?

A. It would be fair to assume, yes, sir.

Q. Tell me what you did as far as perusing the magazine or the magazines?

A. I reviewed the magazines cover to cover, made a determination that the photographs within met the criteria we had used in the previous warrants and arrests and entered the store and placed the clerk under the arrest.

Q. You made a determination that the photographs met the criteria that you had used in previous arrests in previous warrants, is that your testimony?

A. Yes, sir.

Q. And then, on the basis of that you went in and arrested Mr. Macon for, as you indicate, distributing obscene material?

A. Yes, sir.

Q. When did this distribution take place?

A. When Officer Evans purchased the magazine.

Q. Were you there when it was purchased?

A. No, sir.

Q. Do you know whether or not at the time it was purchased anyone had made a determination that that magazine or those magazines were obscene?

A. I don't quite understand your question.

Q. Do you know whether or not at the time Officer Evans purchased the two magazines that he selected anyone had made a determination that those two magazines were obscene or probably obscene?

A. No, sir, I guess it would have been up to Officer Evans.

Q. So, based on your knowledge you know of

no determination as to the obscenity of those two magazines?

A. At that time, no sir.

Q. Prior to your determination?

A. No, sir.

Q. When you went into that store, had you been in there before?

A. Yes, sir.

Q. Would it be fair to say that you were familiar with the surroundings of the store and the material that was in there and probably the employees that were in there?

A. Yes, sir.

Q. This clerk that you referred to, where is he positioned in the store?

A. On a raised counter.

Q. Is he behind a cash register?

A. Yes, sir.

Q. If you recall, Detective Sweitzer, at that cash register, is there a large sign?

A. There are several signs in that area.

Q. Do you recall what those signs indicate?

A. No, sir.

Q. If I were to tell you that there is a sign at the cash register that states the following "That the customer agrees that the material selected by him or her is being purchased for scientific, educational, governmental or other similar justification, would you say that that sign was there?

MR. WHISSEL: Object.

THE COURT: I will sustain the objection. He just wouldn't know. Since he doesn't know whether the sign is there or not, I don't think he can agree as to what it says.

I will sustain the objection.

BY MR. SANDLER:

Q. Do you recall testifying at a deposition in connection with a federal suit in connection with that same question?

A. About the sign?

Q. Yes.

A. No, sir.

Q. Do you recall my taking your deposition with that same question?

A. I recall the deposition.

Q. Do you recall stating the sign was there?

A. No, sir.

Q. You don't recall that?

A. No, sir.

Q. How many times have you been in that store?

A. Approximately five, six.

Q. Tell me what signs you have seen there?

A. I don't recall. Most of the signs I assumed were in reference to material, advertisements and so forth. I didn't pay any attention to them.

Q. Do you recall signs throughout the store indicating the material available in the store is available only for scientific, educational —

MR. WHISSEL: Objection.

THE COURT: He can ask it again.

BY MR. SANDLER:

Q. Do you recall whether or not there were signs throughout the store indicating that the material available in the store is available only for scientific, educational, governmental or other similar justifications?

A. No, sir.

Q. You have no knowledge of that?

A. No, sir, I do not.

Q. And you are familiar with the surroundings of where the cash register is?

A. Yes, I am.

Q. Who instructed you to make the determination whether or not the magazine was obscene?

MR. WHISSEL: Object.

THE COURT: Overruled.

MR. WHISSEL: I think it is assuming a fact not in evidence.

THE COURT: True, but it is still just a motion and I am going to let it in. He can answer. Go ahead.

THE WITNESS: I was given my instructions by Sergeant MacDonald.

BY MR. SANDLER:

Q. He is the individual that instructed you to make the determination of obscenity?

A. Yes, sir.

MR. SANDLER: May we go off the record? May we approach the bench?

THE COURT: Yes.

(Bench conference off the record.)

MR. SANDLER: Your Honor, we have no further questions of this witness.

THE COURT: Do you have any questions, Mr. State's Attorney?

MR. WHISSEL: No, Your Honor.

THE COURT: Thank you very much. You are going to be called back in other cases. I would

appreciate it if you don't discuss your testimony with anyone or allow anyone to discuss it with you.

* * * *

September 15, 1981 - M3. 71 - 76

[TO DETECTIVE SWEITZER, JR.]

MR. SANDLER: I would like to go back to the case of Baxter Macon which is C.A. 81-396. This is Case No. 81-396, Officer, and involves May 6, 1981.

FURTHER DIRECT EXAMINATION

BY MR. SANDLER:

Q. This involves May 6, 1981?

A. Yes, sir.

Q. And that involves the defendant Baxter Macon. Are you familiar with the arrest that was made on May 6, 1981 involving Baxter Macon?

A. Yes, sir.

Q. Were you in fact the arresting officer?

A. Yes, I was.

Q. You are not the officer that made the

selection or the purchase or the material, are you?

A. No. sir.

Q. Is Detective Evans actually the one who selected the material and purchased it?

A. Yes, sir.

Q. Was he following your instructions?

A. Yes, sir.

Q. Did you tell him to look for material that depicted explicit sexual conduct and that's the material that you felt the Court would deem obscene? After he had obviously purchased or selected a magazine and I believe it was a magazine, several magazines, is that correct?

A. Yes, sir.

Q. There were no films involved?

A. No, sir.

Q. He brought those magazines out to you?

A. Yes, sir.

Q. You examined the magazines?

A. Yes, sir.

Q. You made a determination that in your opinion they were obscene?

A. Yes, sir.

Q. As a result of that determination, did you prepare an examination [sic, statement] of charges?

A. Yes, sir.

Q. Did you have a statement of charges with you?

A. Yes, sir.

Q. Did you go in and arrest the defendant?

A. Yes, sir.

Q. Did you arrest him based on your information that the material Detective Evans bought was obscene?

A. Yes, sir.

Q. Prior to the time that Detective Evans had purchased and selected the material, do you know of anyone that made a determination that that material was obscene?

A. No, sir.

Q. That statement of charges was made on your personal opinion, on the basis of what Sergeant MacDonald instructed you?

A. Yes, sir.

Q. In that case, did you give him any pre-recorded money?

A. Yes, a 50 dollar bill.

Q. Did you take the 50 dollar bill back?

A. Yes, sir, I did.

Q. Did you give him back the change that was given to Detective Evans?

A. No, sir.

Q. Do you still have the 50 dollar bill?

A. Not the 50 dollar bill, no, sir.

Q. Do you still have the change?

A. Yes, sir.

Q. Who has the 50 dollar bill?

A. It is back in the police funds.

Q. Do you still have the magazine?

A. Yes, sir.

Q. The idea to buy or look for obscene material or material that the Courts would deem obscene was obviously originated with Sergeant MacDonald, is that a fair statement?

A. I don't get my instructions from him.

MR. SANDLER: No further questions.

MR. WHISSEL: Court's indulgence.

MR. SANDLER: One question.

BY MR. SANDLER:

Q. At the time you made the arrest of Baxter Macon, did you place him in handcuffs?

A. Yes, sir.

MR. SANDLER: No further questions.

CROSS-EXAMINATION

BY MR. WHISSEL:

Q. Detective Sweitzer, the arrest of Mr. Macon took place after the magazine or the items of evidence were purchased by Detective Evans, is that correct?

A. Yes, sir.

Q. And any monies that were retrieved were retrieved after you observed or looked at the items of evidence that Detective Evans had purchased, is that correct?

A. Yes, sir.

MR. WHISSEL: That's all I have.

THE COURT: Any further questions?

MR. SANDLER: Your Honor, in this case Detective Evans I think we have established did actually make a purchase. But we have been informed by the deputy that he can't serve him with a subpeona because he is in an undercover capacity. We have attempted to bring him before the Court and unless we have some help from the prosecutor, we are not going to be able to do so. I don't know there was going to be any objection to us having established the sale.

MR. WHISSEL: He is under summons from the State and I assume we have equal powers of the Court to reach him.

THE COURT: Do we need to reach

Detective Evans?

MR. WHISSEL: I don't know. Only Mr. Sandler can answer.

MR. SANDLER: My question was, are you going to require us to establish by any other person the sale? If so, I am going to ask that we continue this matter and instruct the sheriff that he must, based on what I have been told this morning, that they can serve the police station. We were called at our office and he said he could not serve the subpoena.

THE COURT: What is the State's position? Will you stipulate —

MR. SANDLER: Based on Detective Evans' instructions and the fact that he purchased it with a marked bill and it was recovered.

MR. WHISSEL: To precisely that I will stipulate it.

MR. SANDLER: We don't need Detective Evans.

We have no further questions or any

further cases for Detective Sweitzer.

THE COURT: Thank you.

(Witness excused).

* * * *

COURT'S RULING

September 15, 1981 - M3. 127 - 133

THE COURT: We are dealing with, I believe, a total of seven cases that we have broken out of the total group of cases and are dealing with these cases because of availability of witnesses at the time the motions were heard. I am going to deal with the facts as a group rather than going over each and every case individually because all of the facts are very similar.

We have in the community apparently complaints that have arisen from neighborhoods, from various groups and organizations to the police, which brings about an undercover operation as to various bookstores in Prince George's County known as adult

bookstores.

Undercover police officers go into the bookstores after a pre-determined method of operation, discussion among themselves and with the State's Attorneys and decide to purchase what they determine to be from the material itself obscene material. They then review the material and do one of two things. They go back and make an arrest in three or four of these cases without a warrant, or at least in one case here, they go before a commissioner and get an arrest warrant, a statement of charges and effectuate the arrest.

It's been argued by the defense that the charging documents ought to be dismissed and if they are themselves not dismissed, then the evidence ought to be suppressed at the time of trial. I will deal first with the motion to dismiss and what we consider to be one of the more important, if not the most important issue in the motion to dismiss, and that is prior judicial determination.

The cases that the defendants have cited in their well-reasoned and well-thought-out arguments and presentations are Roaden versus Kentucky, Marcus versus Search Warrants, A Quantity of Books versus Kansas. These are all cases in which the decisions have condemned mass or broadly effective seizures of allegedly obscene material without a prior adversary hearing. The Supreme Court has repeatedly held that confiscatory seizure of substantial quantities of books or other matters are not permissible unless preceded by an adversarial judicial determination of the obscenity of the material. The rationale is clear. The rationale is to safeguard against governmental suppression of non-obscene expression which is protected by the First Amendment.

What this comes down to is, you can't seize an effective prior restraint without a prior adversary hearing. This is well and good. But this law and these cases, this Court finds are totally inapplicable to the cases that are before us. I do not

find that we have a seizure under the Fourth Amendment. I find the Fourth Amendment inapplicable and therefore will not address the question of standing since that is moot based upon my decision of inapplicability of the Fourth Amendment, nor do I find we have an issue of prior restraint. The materials in our cases were bought by the police officers, not seized.

The issue is whether a prior judicial determination is required as I see it, before an arrest for an obscenity violation can be made.

In Adler versus Pomerlau at 313 F.Supp. 277, a 1970 case, a three-judge District Court panel in Maryland, Judge Northrup writing the opinion held that an adversary hearing on the issue of obscenity is not required prior to arrest, Judge Northrup in writing for the Court felt strongly that the requirement of an adversary hearing prior to seizure in combination with the traditional safeguards inherent in a criminal prosecution will adequately protect First Amendment

rights. However, a prior judicial determination before arrest in other jurisdictions has found some support.

In Delta Book Distributors, Inc. versus Cronvich, 304 F.Supp. 662, in Sokolic versus Ryan, 304 F.Supp. 213, in Cambist Films, these cases held that a prior judicial determination prior to arrest was preferred but Adler rejected this approach as not well reasoned.

Adler, of course, is a case of the Maryland Federal Courts. A New York Federal Court has also rejected the prior determination before arrest and has followed the same approach as Adler in Milky Way Productions versus Leary, 305 F.Supp. 288. The Milky Way Court held that there need not be an adversary hearing before an arrest for obscenity. There are a few cases which address the issue of prior determination before arrest. Most of the cases address the issue of adversary hearing for a prior determination before a seizure. Milky Way and Adler are the most persuasive along with Paperback Mart

versus City of Anniston, Alabama, 407 F.Supp. 376 and Rage Books versus Leary, 301 F.Supp. 546.

There is an amazingly similar case in New York, People versus Kokich, 338 N.Y.S. 2d 463 decided at the trial level which held, no prior adversary hearing or judicial scrutiny was required before the arrest of the defendant on obscenity. In that case, in purchasing the material, the police officers did in some of these cases obtain an arrest warrant. The Kokich case held all that was necessary was the purchase of the books and arrest warrants and return to effectuate the arrest.

Based upon the law and what I consider to be the controlling law of Adler and Milky Way, I deny the motion for dismissal for want of prior determination.

I would now like to deal with the constitutionality issue that has been raised in the motion to dismiss, constitutionality of Section 418 of Article 27.

The Maryland obscenity statute has been on the Maryland books for 14 years, basically in the same format. It was first enacted as written in 1967 and has never been struck, though this in itself does not mean that it is constitutional. In other words, all that means is that the State statute must be construed within the law the finding of obscene as set forth in Miller and are as is. The statute has always been read against the backdrop of the Miller obscenity test.

There is no logical reason for finding the statute is unconstitutional. Nor do I find that the application based upon the facts that I have found to be unconstitutional.

Dealing now with the exemption section of 423, the Court of Special Appeals has set us guidelines to follow in State versus Gravette, on the applicablity of Section 423. The Court states in those guidelines that 423 should be considered after a trial on the merits and on the submission of a motion for judgment of acquittal. Therefore, we do not consider it to be an

applicable consideration on the motion to dismiss or on the motion to suppress.

Probable cause in the arrest warrant has been of some concern. The State has brought to the Court's attention the case of Schaefer versus State, 31 Md. App. 437, in which the Court of Special Appeals held a written application for their warrant by law enforcement officials having personal knowledge was sufficient to establish distribution to justify a prudent and cautious man in believing that a crime that was alleged was actually committed. The Court went on to explain that an arrest warrant is to be issued only if it appears to the commissioner upon oath that there is probable cause to believe a crime has been committed and the accused has committed the crime. Probable cause is less than a certainty and more than a mere suspicion. I say this even though there is a conflict and a dispute as to who prepared the statement of charges. It could well have been that the police officers in this case did prepare the statement of

charges and the commissioners were incorrect. But regardless of who prepared them, the commissioners have the final obligation of reviewing them to determine that that was the charge.

I do not find it critical that someone else would have prepared it if the commissioner signed it, having the ultimately responsibility for charging the defendants. The facts contained in the application, whether or not they looked at the material, and they did not look at the material, and I find there was no need for them to look at the materials were sufficient to establish trustworthiness to justify the commissioner's action in issuing the warrant and believing that a crime had been committed.

Finally, the issue has been raised as to entrapment, and that was enunciated in Simmons versus State 8 Md. App. 355. The test of entrapment as argued is certainly accurate. And that is, two questions of fact arise. One, did the agent induce the accused to commit the offense charged in the charging

document, and two, if so, was the accused ready, willing and able without persuasion and was he awaiting an opportunity to commit the offense? But the problem is not the test, but when should we apply the test? And the Court in Simmons sets down procedural guidelines and at Page 364 they tell us a motion to dismiss the indictment or suppress the evidence does not lie.

I believe that I have covered all of the issues and I believe that my ruling was clear.

Just to restate it, the motion to dismiss for the reasons given is denied.

The motion for suppression for reasons given is denied and this is applicable to all the cases that are now before the court.

No. 84-778

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF MARYLAND,

Petitioner,

v.

BAXTER MACON,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the Exclusionary Rule is applicable to magazines purchased by an undercover police officer prior to any possible illegality in the later warrantless arrest of the seller and retrieval of the purchase money?

2. Whether Respondent's warrantless arrest shortly after his sale of the magazines, without any prior judicial determination of obscenity, was constitutional?

3. Whether it is appropriate under the Double Jeopardy Clause for an appellate court to determine that the State's evidence will be insufficient upon retrial simply because it has held that certain evidence was inadmissible, and thus for the court to order that the charge be dismissed?

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NO. 84-778

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

STATE OF MARYLAND,

Petitioner

v.

BAXTER MACON,

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Special Appeals of Maryland in Macon v. State, is reported at 57 Md. App. 705, 471 A.2d 1090, cert. denied, State v. Macon, 300 Md. 795, 481 A.2d 240 (1984).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). The Court of Appeals of Maryland denied the Petition for Writ of Certiorari to the Court of Special Appeals on September 14, 1984. The Petition for Writ of Certiorari was filed in this Court on November 14, 1984.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES

(full text in appendix)

United States Constitution

- Amendment I
- Amendment IV
- Amendment V
- Amendment XIV

Annotated Code of Maryland (1982 Repl.Vol.)

- Article 27 - Crimes and Punishment
  - Section 417
  - Section 418
  - Section 424
  - Section 425

Maryland Rules of Procedure

- Currently in effect:
  - Rule 4-211 (b)(2)
  - Rule 4-212 (f)(1)
  - Rule 4-213 (a)
  - Rule 4-216 (a), (c), (d), (g)

In effect on May 6, 1981:

- Maryland District Rule 720a, h1
- Maryland District Rule 721a, f
- Maryland District Rule 723a, b4

STATEMENT OF THE CASE

During the months of April and May, 1981, the Prince George's County Police Department Vice-Criminal Intelligence Section investigated complaints that several bookstores were selling obscene material (e.g. M2. 17, M2. 56).[1] Baxter Macon, Respondent, was a sales clerk at the Silver News, Inc., 2488 Chillum Road, Hyattsville, Maryland, where, on May 6, 1981, at about 7:20 p.m. he was arrested for distribution of obscene material based on his sale of two magazines to a police detective a few minutes earlier (J.A. 33-34). The circumstances of the

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[1] The transcripts appear at R. 124 and are designated as follows: Motions Hearings: "M1" - September 1, 1981, "M2" - September 2, 1981, "M3" - September 15, 1981, "M4" - September 16, 1981; Trial: "T." - September 16, 17, 18, 21, 1981.

investigation, the arrests of Respondent and others, the purchases of the allegedly obscene material, and the retrieval of some of the purchase money were the subject of a consolidated hearing on motions to dismiss and motions to suppress filed by several defendants involved in cases arising from the investigation.

The general procedure utilized by the police was to have an officer in civilian clothes go to one of the adult bookstores, browse through it and purchase an item depicting explicit sexual conduct (J.A. 43, M2. 50). At times the police used bills whose serial numbers had been recorded (e.g. M2. 19-20). The item was then examined in its entirety by the purchasing officer and other officers to determine whether it was probably obscene (e.g. M2. 21).

At the beginning of the investigation, the purchasing officer was instructed to apply for a statement of charges/arrest warrant before a Disrict Court Commissioner (M2. 60-62). Those warrants obtained prior to May 6, 1981 were held until that

date, when they were all served in an effort to reduce the possibility of the suspects fleeing.[2] In part because of the difficulty in identifying the clerks involved (from license checks on automobiles, and/or surveillance) and because the investigation was coming to an end, instructions were given later to arrest the clerks immediately to facilitate their identification

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2 The supervising officer, Sgt. MacDonald testified that it was decided at the beginning of the investigation not to make any arrests until the investigation was complete (M3.105).

Det. Sweitzer testified that all arrest warrants were served on May 6, 1981 and that no arrests at all had been made before then. He explained:

> "We wished to investigate the complaint in its entirety as well as we could and after one month we had gone about as far as we could go and we were at a stage where we had a number of arrest warrants to be served and a limited number of man-power to serve them, so we cleared the investigation at that time."

Simultaneous arrests also reduced the possibility of flight. The warrantless arrests occurred at "around" the time the arrest warrants were served, also to minimize the danger that the clerks would disappear (M2.123-24).

and to minimize the danger that the particular clerk would disappear prior to arrest.[3] On some of the immediate arrests, the purchase money was seized as evidence. On one of those occasions the change made by the clerk was returned, upon his request (M3. 52).

Mr. Macon's arrest came toward the end of the investigation. At about 7:00 in the evening of May 6, 1981, Detective Ray Evans went to Silver News, where he browsed for fifteen minutes or so. At trial, the evidence revealed that the store windows were covered with paper to a point above eye-level for a normal sized person, so that passersby on the outside could not see in. Magazines were displayed on the

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3 For instance, defendant Ball was arrested without a warrant by Det. Husk who had "only seen Mr. Ball behind the counter selling products to the general public twice. I didn't know where Mr. Ball lived. We had a very tough time getting a return on his tag on the vehicle that he was driving so we couldn't find out the current address on it. So, in order to make sure we had Mr. Ball at that time, to make sure we could effect the arrest, we did it as a misdemeanor committed in our presence with Mr. Ball." (M2. 64-65). Another defendant was arrested by Det. Husk also because of identification problems (M2. 79-80).

walls almost from ceiling to floor. All of the magazine covers contained depictions of sexual acts; most were wrapped in plastic. On the right side of the store, empty packages of eight millimeter movies were displayed. In the back of the store there was a movie room where customers could view for a fee the movies that were offered for sale (T. 79-81).

Detective Evans selected two magazines wrapped in plastic (J.A. 34). The wrapper was unsealed so he took the magazines out and examined them from cover to cover (T. 82-83, 86). He took them to Mr. Macon, who stood behind the cash register on a platform (J.A. 37). Evans paid for the magazines with a fifty dollar bill with a recorded serial number and received nearly thirty-eight dollars in change. He took the magazines to two other officers who were waiting in a car in the parking lot. Detectives Roland B. Sweitzer, Jr. and John L. Fickinger examined the magazines along with Evans (T. 114). They concluded that the photographs met the criteria they had used

for prior obscenity warrants and arrests (J.A. 35). The three then went in to the bookstore, arrested Mr. Macon and retrieved the fifty dollar bill. He did not request - and the police did not offer - the return of the change (J.A. 45).

Pursuant to Maryland procedure, Mr. Macon was charged with distributing obscenity in violation of Article 27, §418 of the Maryland Code by a Statement of Charges in the District Court and released on his own recognizance within two to three hours of his arrest on the evening of May 6, 1981. (R. 5-10) A preliminary inquiry was set in District Court for May 12, 1981. On that date, he demanded a jury trial and the case was transferred to the Circuit Court for Prince George's County. It was initially scheduled for arraignment on May 22, 1981 and for trial on August 31, 1981. After a pre-trial conference, Macon filed both a Motion to Dismiss (R. 21-24) (J.A. 5) and a Motion to Suppress (R. 25-26) (J.A. 3), followed by a Memorandum in Support (R. 30-55) (J.A. 10). The

State responded (R. 66-71) (J.A. 25). A hearing on both motions was ultimately held on September 1, 2 and 15, 1981. Both were denied. A motion for reconsideration was heard on September 16, 1981. It, too, was denied.

Respondent's motions to dismiss and to suppress were based, in part, on the fact that a neutral judicial officer did not view the magazines prior to Respondent's arrest. He argued that he was entitled to dismissal of the charging document because his warrantless arrest constituted an illegal prior restraint on his right to freedom of expression. He further asserted that when the police officer came into possession of the magazines by misrepresenting an exchange of money for goods he committed theft by "false pretense" under Maryland Annotated Code, Article 27, §341. Therefore, Respondent argued that the retention of the magazine by the police as a result

of the sham sale constituted an illegal seizure without a warrant.[4]

In denying both motions, Judge Woods rejected Respondent's argument, finding instead, as the State had argued, that the bargained for exchange of magazines for money was not a seizure and that no prior judicial determination of obscenity was needed for the arrest of Respondent without a warrant for distribution of obscene matter (J.A. 49).

The magazines were admitted at Respondent's jury trial (St. Ex. 1 and 2, T. 77, 88). The only additional objection to their admission was based on Respondent's lack of opportunity to have a voir dire examination of Detective Evans on the chain of custody (T. 85-88). The State did not introduce the

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4 Respondent specifically disavowed any intent to move to suppress the fifty dollar bill (M3. 22) which was, in any event, not used as evidence at the jury trial. That particular bill had apparently been returned to police funds by the time of the hearing, although the police had retained the change given to Det. Evans as potential evidence (J.A. 45).

fifty dollar bill. At the conclusion to the four day trial from September 16-21, 1981, in which he asserted an entrapment defense, Respondent was found guilty of distribution of obscene matter (T. 515). After waiving his right to speedy sentencing on December 2, 1981, Respondent was sentenced on January 25, 1983 to pay a fine of five hundred dollars, plus seventy-five dollars in court costs (R. 3).

Respondent filed a timely appeal to the Court of Special Appeals. On March 2, 1984, the Court of Special Appeals reversed Respondent's conviction in a reported opinion by Judge John J. Bishop, Jr. (A.P.C. 1), holding that the warrantless arrest of Respondent was illegal. The court held that there was insufficient probable cause to support the warrantless arrest since the police had not taken the magazines to a judicial officer for a determination of obscenity. Notwithstanding the fact that the police officer had purchased the magazines from Respondent prior to the arrest, the Court of Special Appeals condemned this

voluntary exchange of goods for money as a "constructive seizure", based on the improper subjective intent of the officers to retrieve the purchase money later, and ordered that the magazines should have been suppressed to punish such police misconduct. Not only was Respondent's conviction reversed, but the Court of Special Appeals ordered that the indictment be dismissed. The State of Maryland's Motion for Reconsideration was denied. The State then filed a Petition for Writ of Certiorari in the Court of Appeals of Maryland which was denied on September 14, 1984.

SUMMARY OF ARGUMENT

I. The special constraints imposed by the First Amendment do not apply unless there is a Fourth Amendment search or seizure. The purchase of a magazine, even by an undercover police officer who later arrests the seller without a warrant and retrieves the purchase money, is neither a search nor a seizure.

The Exclusionary Rule does not apply to evidence obtained prior to any alleged illegality.

II. Ordinarily the normal components of due process protect a defendant's rights and a police officer may determine probable cause to arrest without a warrant. Only if those procedures fail to prevent a prior restraint on free expression of presumptively protected material does an otherwise reasonable seizure become unreasonable. In Maryland, the prompt judicial determination of probable cause for anyone arrested without a warrant and the bona fide law enforcement rationale for making the warrantless arrest here prevented any improper interference with First Amendment interests.

III. The Double Jeopardy bar of Burks v. United States, 437 U.S. 1 (1978), is limited to appellate reversal for evidentiary insufficiency. Reversal based on the improper admission of evidence is not a "termination of jeopardy" that would prohibit a new jeopardy. It was inappropriate for the appellate court

to determine that the remaining evidence, discounting the evidence it found inadmissible, will be insufficient at a new trial.

ARGUMENT

Introduction

At issue in this case is when - if at all - the sale of magazines in a commercial setting can trigger the Exclusionary Rule of the Fourth Amendment. Obviously annoyed that the Prince George's County Police took back the purchase money when they arrested Respondent a few minutes after the transaction (and, worse, did not return the change), the Court of Special Appeals of Maryland first held that the magazines were obtained through a "constructive seizure" and should not have been admitted at Respondent's trial for distribution of obscene material. Secondly, the court held that the warrantless arrest, prior to a determination by a judicial officer that the magazines were probably

obscene, was unconstitutional. Finally, finding that the evidence would be insufficient to convict without the magazines, the court ordered that the charges be dismissed.

The State of Maryland challenges all three aspects of the court's ruling, arguing that the Fourth Amendment, even when augmented with the special protections under the First Amendment, does not compel this result. Under proper analysis, the actions of the police were completely proper. More importantly, however, even if the warrantless arrest and retrieval of the money were improper, those actions do not convert retrospectively an otherwise unremarkable purchase into an unconstitutional seizure. That totally unwarranted extension of the Exclusionary Rule is a thinly veiled effort to punish the police for later transgressions and "bad faith". It clearly requires reversal.

I.

THE EXCLUSIONARY RULE DOES NOT REACH MAGAZINES PURCHASED PRIOR TO ANY POSSIBLE ILLEGALITY IN THE LATER WARRANTLESS ARREST OF THE SELLER AND RETRIEVAL OF THE PURCHASE MONEY.

There are, no doubt, "special constraints upon searches for and seizures of material arguably protected by the First Amendment." Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326 n.5 (1979). Given as examples there were Heller v. New York, 413 U.S. 483 (1973) (First Amendment safeguards adequate to validate New York procedure for warranted seizure of single copy of film for bona fide evidentiary purpose) and Marcus v. Search Warrant, 367 U.S. 717, 731-32 (1961) (invalidating Missouri warrant procedure for obscenity cases as applied on due process grounds).[5] In each of those instances however, there was, first and

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5 Marcus was decided the same day as Mapp v. Ohio, 367 U.S. 643 (1961), but was based on due process rather than Fourth Amendment Exclusionary Rule grounds.

foremost, a search or seizure that implicated the Fourth Amendment. As characterized more recently in Zurcher v. Stanford Daily, 436 U.S. 547, 564-65 (1978), "the prior cases do no more than insist that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search." Those cases are precisely the ones relied on by Respondent, by the Maryland Court of Special Appeals, and by the few other courts whose opinions are cited for support:

> "Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.' Stanford v. Texas, [379 U.S. 477] supra, at 485, 13 L.Ed.2d 431, 85 S.Ct. 506. 'A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material.' Roaden v. Kentucky, 413 U.S. 496, 501, 37 L.Ed.2d 757, 93 S.Ct. 2796 (1973). Hence, in Stanford v. Texas, the Court invalidated a warrant authorizing the search of a private home for all books, records, and other materials relating to the Communist Party, on the ground that whether or not the warrant would have been sufficient in other contexts, it authorized the searchers to rummage among and make judgments about books and papers and was the functional

equivalent of a general warrant, one of the principal targets of the Fourth Amendment. Where presumptively protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field.

Similarly, where seizure is sought of allegedly obscene materials, the judgment of the arresting officer alone is insufficient to justify issuance of a search warrant or a seizure without a warrant incident to arrest. The procedure for determining probable cause must afford an opportunity for the judicial officer to 'focus searchingly on the question of obscenity.' Marcus v. Search Warrant, supra, at 732, 6 L.Ed.2d 1127, 81 S.Ct. 1708; A Quantity of Books v. Kansas, 378 U.S. 205, 210 12 L.Ed.2d 809, 84 S.Ct. 1723 (1964); Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636, 637, 20 L.Ed.2d 1313, 88 S.Ct. 2103 (1968); Roaden v. Kentucky, supra, at 502, 37 L.Ed.2d 757, 93 S.Ct. 2796; Heller v. New York, 413 U.S. 483, 489, 37 L.Ed.2d 745, 93 S.Ct. 2789 (1973)."

The "special constraints" imposed by the First Amendment, are applicable, then, only if there is a Fourth Amendment interest involved. Completely lacking in the opinion below is any proper analysis of that Fourth Amendment threshold. When that analysis is made, the conclusion rapidly appears that the government action here in obtaining the magazines

was neither a search nor a seizure under the Fourth Amendment.

A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. United States v. Karo, 468 U.S. __, 104 S.Ct. 3296, 3302, 82 L.Ed.2d 530, 539 (1984); United States v. Jacobsen, 466 U.S. ___, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85, 94 (1984). Respondent claims no such expectation and none would be reasonable. The commercial establishment invited in all members of the public to purchase the magazines. The officer did no more.[6] Lewis v. United States, 385 U.S. 206 (1966). Respondent, as a sales clerk standing ready at a cash register, had no privacy expectation whatsoever in the wares he sold to the public. Not even the court below could construe the actions as a search.

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6 This public access in fact makes particularization of complaints in the obscenity cases more feasible. Marcus, 367 U.S. at 735 n.27.

A seizure occurs when there is some meaningful interference with an individual's possessory interests in the property, United States v. Karo, 468 U.S. at __, 104 S.Ct. at 3302, 82 L.Ed.2d at 540; United States v. Jacobsen, 466 U.S. at __, 104 S.Ct. at 1656, 80 L.Ed.2d at 94. Here, Respondent voluntarily transferred any possessory interest he had in the magazines to the purchaser. As long as the clerk received the necessary tariff, he was happy to part with the possession of the magazines - permanently. Compare United States v. Van Leeuwen, 397 U.S. 249 (1970), where the defendant retained a Fourth Amendment interest in packages he mailed to others. That interest was found not to have been invaded by their temporary detention. In this case Respondent's possessory interest was irrevocably severed when he accepted the purchase money. He - or Silver News - then obtained an interest in the money. The only interference with any possessory right, and hence, the only seizure, was of the fifty dollar bill used to effect the purchase.

Respondent has never moved to suppress it nor has he or any other party including Silver News, Inc., sought compensation for its seizure. Whatever rights anyone may have to the money, however, do not affect Respondent's possessory rights in the magazines under the Fourth Amendment.

If the magazines were obtained without any search or any seizure, the Fourth Amendment predicate is lacking, and there is no need to apply the heightened scrutiny necessary for the protection of First Amendment interests.

Ignoring this clear analysis, the Maryland Court of Special Appeals strained to contort the facts of this case into a Fourth Amendment context. Its view was that from the later illegal police conduct in arresting Respondent without a warrant and retrieving the purchase money, one must infer that the police - in bad faith - intended from the outset to pursue an unconstitutional course of action, which in turn converted the purchase into an invalid "constructive

seizure" under the Fourth Amendment to the United States Constitution. The remedy for that unlawful seizure was suppression of the magazines.[7] That view cannot withstand scrutiny.

There are two necessary components to the court's analysis. First, the finding that the police lacked a bona fide ("good faith") intent to part with the money - make a purchase - at the time they acquired the magazines is a prerequisite to calling the transaction a constructive seizure. Next, the belief that the police action was tainted by a pre-conceived, and unalterable, notion that the magazines would be obscene, regardless of their actual content, is necessary to find a First Amendment restraint. Neither assumption is supported by the record.

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[7] The Court of Special Appeals drew heavily from State v. Furuyama, 637 P.2d 1095 (Haw. 1981), a decision described as taking "a substantial and questionable step" beyond Roaden in 2 W. LaFave, Search and Seizure §6.7(e) (1978, 1984 supp.).

The police were investigating complaints about the distribution of obscenity in the adult bookstores. They had made purchases at the Silver News on other occasions and had initiated criminal prosecutions. They did record the serial number of a fifty dollar bill prior to the sale. However, when the officer went in to the Silver News at about 7:00 p.m. on May 6, 1981, selected two magazines, took them to the clerk, and paid for them, there was no inevitability to what followed. The purchasing officer did not decide on his own that he had witnessed the unlawful distribution of obscene material. Rather, he took the magazines to be examined by two other officers who collectively concluded that there was probable cause to believe that the material was, in fact, obscene. Then the decision was made to go back in to the store immediately and to arrest Respondent without a warrant. Retrieval of the identifiable fifty dollar bill accompanied the arrest. The officers could have concluded that these particular magazines were not

probably obscene under Miller v. California, 413 U.S. 15 (1973). The officers could have decided to take their information to a commissioner and seek an arrest warrant for the clerk. The fact that they did neither, and instead arrested Respondent without a warrant does not convert the purchase into a constitutional violation justifying the full wrath of the Court of Special Appeals.

The examination and purchase of potentially obscene material by officers posing as ordinary customers has received more than tacit approval in prior decisions of this Court. In Marcus, 367 U.S. at 733 n.26, the English practice that began with the purchase of suspected obscenity by a police officer was characterized as placing a greater restraint on seizure power than required by the Due Process Clause. The events ultimately condemned in Lo-Ji Sales, Inc. v. New York, supra, also began with an unremarkable purchase of two reels of film, 442 U.S. at 321. That transaction was so benign that the "clerk

arrested at petitioner's store entered a guilty plea to a charge of disorderly conduct for selling the two films to the State Police investigator. He did not appeal." 442 U.S. at 324 n.4. Similarly, the prosecution in Smith v. United States, 431 U.S. 291, 293 (1977), was based on materials mailed by Smith "at the written request of postal inspectors using fictitious names." Finally, in Heller, supra, 413 U.S. at 485, both police officers and a judge purchased tickets and viewed a film suspected of being obscene. These cases demonstrate that undercover police work is a useful and accepted tool in obscenity investigations, just as it is in narcotics cases, Lewis, supra.

That some illegality may follow a legitimate purchase cannot change its nature as conduct beyond the reach of the Fourth Amendment. The Supreme Court of Minnesota reached precisely that conclusion in State v. Welke, 216 N.W.2d 641, 644 (Minn. 1974), where the purchase of three magazines was followed by a warrantless arrest, the retrieval of the "buy

money," a two and one-half hour search, and the seizure of a large number of other magazines. The court refused to suppress the three magazines purchased:

> "Whatever the subjective intent of the two officers may have been, however, the transaction by which they obtained the magazines in exchange for money cannot be considered a search or seizure. Purchases by undercover agents from willing sellers, in places far more private than a bookstore, were held in Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966), not to violate the Fourth Amendment."

Other courts agree. For example, Missouri appellate courts upheld use of the magazines in State v. Cox, 619 S.W.2d 794, 797 (Mo.App. 1981), cert. denied, 455 U.S. 976 (1982), and State v. Perry, 567 S.W.2d 380, 382 (Mo.App. 1978). In both cases, the police confiscated the purchase money when the defendants were arrested warrantlessly just after the sales. See also Hunt v. State, 601 P.2d 464, 466-67 (Okl.Cr.App. 1979) (even subsequent illegal arrest would not affect use of purchased film).

Perhaps more egregious than its distorted view of the nature of the Fourth Amendment itself was the Court of Special Appeals' extension of the Exclusionary Rule backward in time, to exclude evidence obtained prior to any alleged illegality. Last term, the Court emphasized the proper role of the Exclusionary Rule when, in Nix v. Williams, __ U.S. __, 104 S.Ct. 2501, 2508-10, 81 L.Ed.2d 377, 386-87 (1984), the "inevitable discovery" doctrine was formally recognized:

> "The core rationale consistently advanced by this Court for extending the Exclusionary Rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections. This Court has accepted the argument that the way to ensure such protections is to exclude evidence seized as a result of such violations notwithstanding the high social cost of letting persons obviously guilty go unpunished for their crimes. On this rationale, the prosecution is not to be put in a better position than it would have been in if no illegality had transpired.
>
> By contrast, the derivative evidence analysis ensures that the prosecution is not put in a worse position simply because of

> some earlier police error or misconduct. The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation."

An overriding principle emerged from these doctrines:

> "It is clear that the cases implementing the Exclusionary Rule 'begin with the premise that the challenged evidence is in some sense the product of illegal governmental activity.' United States v. Crews, 445 U.S. 463, 471, 63 L.Ed.2d 537, 100 S.Ct. 1244 (1980) (emphasis added)." Id. at 387.

Furthermore, the Court laid to rest any notion that police "bad faith" triggers the Exclusionary Rule:

> "The requirement that the prosecution must prove the absence of bad faith, imposed here by the Court of Appeals, would place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity. Of course, that view would put the police in a worse position than they would have been in if no unlawful conduct has transpired. And, of equal importance, it wholly fails to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice. Nothing in this Court's prior holdings supports any such formalistic, pointless, and punitive approach." Id. at 388.

An even greater reason to resist extending the Exclusionary Rule exists here — the magazines were both discovered and lodged firmly in police custody before any arguable improper police actions occurred. The entire premise of the Exclusionary Rule is lacking. The challenged evidence was not in any sense the product of illegal governmental activity.[8]

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[8] There were two items of potential evidence obtained following the arguably improper police actions. The immediate warrantless arrest of Respondent made his identification easier and the retrieval of the fifty dollar bill made it available as evidence at trial. As to the first, the Court recently reaffirmed the principle that:

> "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred. See Gerstein v. Pugh, 420 U.S. 103, 119, 43 L.Ed.2d 54, 95 S.Ct.854 (1975). Frisbie v. Collins, 342 U.S. 519, 522, 96 L.Ed.2d 541, 72 S.Ct. 509 (1952). United States ex rel Bilokumsky v. Tod [263 U.S. 149,] 158, 68 L.Ed.2d 221, 44 S.Ct. 54." Immigration and Naturalization Service v. Lopez-Mendoza, 468 U.S. ___, 104 S.Ct. 3479, 3485, 82 L.Ed.2d 778 (1984).

Cont'd.

Lacking completely any Fourth Amendment intrusion, and with no sound basis to invoke the sanction of the Exclusionary Rule, the trial court properly denied Respondent's motion to suppress the magazines. The action of the Court of Special Appeals in reversing that determination must itself be reversed.

II.

THE WARRANTLESS ARREST OF RESPONDENT SHORTLY AFTER HIS SALE OF THE MAGAZINES, WITHOUT ANY PRIOR JUDICIAL DETERMINATION OF OBSCENITY, WAS CONSTITUTIONAL.

In addition to finding an illegal "constructive seizure" in the purchase of the magazines, the lower court found that the warrantless arrest of Respondent was unconstitutional. It held that "a necessary predicate to seizure of the person, as well as the

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Nor, of course, would an illegal arrest defeat jurisdiction over Respondent, United States v. Crews, 445 U.S. 463, 474 and n.20 (1980). As to the second item, Respondent never moved to suppress the fifty dollar bill, and it was not introduced at trial.

allegedly obscene matter he distributes, is a prior judicial determination that there is probable cause to believe the matter is obscene." (A.P.C. 10). Petitioner submits that this is an unnecessary and unwarranted extension of the special protection afforded materials presumptively protected by the First Amendment.

A warrantless arrest, if properly based on probable cause, is constitutional. Gerstein v. Pugh, 420 U.S. 103, 113 (1975). In United States v. Watson, 423 U.S. 411, 418 (1976), the Court concluded that:

> "[t]he cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable grounds for making the arrest."

It is also well recognized that police officers, through training and experience, may acquire an expertise not possessed by laymen and that probable cause determinations are made in light of that expertise. 1 W. LaFave, Search and Seizure, §3.2(c) (1978) (citing

inter alia, United States v. Ortiz, 422 U.S. 891 (1975); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Terry v. Ohio, 392 U.S. 1 (1968); and Johnson v. United States, 333 U.S. 10 (1948)). According to Respondent, however, a warrantless obscenity arrest is improper because a police officer is incapable of determining that a particular item probably meets the test for obscenity under Miller v. California, supra, 413 U.S. at 24-25 (1973).[9] That argument is specious, particularly in light of the Court's observation in Miller that the presentation of "expert" testimony on community standards by an experienced police officer "was certainly not constitutional error." 413 U.S. at 31

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9 a) Whether the average person applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interest;

b) Whether the work depicts or describes sexual conduct, in a patently offensive way, and

c) Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

n.12. One capable of contributing expert knowledge on part "a" of the test is certainly capable of assessing the probability that part "a" as well as parts "b" and "c" are present.

The more significant aspect of the question presented is whether the Respondent's arrest "brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition," and thus, whether it constituted a forbidden "prior restraint of the right of expression" making it "unreasonable" under the Fourth Amendment. Roaden v. Kentucky, 413 U.S. 496, 504 (1973). All of the Court's prior pronouncements in this area have focused on the seizure of books, magazines, or films and have not dealt directly with the seizure (arrest) of the distributor. When analyzed under those precedents, however, it becomes clear that a warrantless arrest, without more, does not offend the First Amendment. The strict requirements applicable to the seizure of the materials themselves provide ample protection from improper prior restraints.

On other occasions, courts have been asked to invalidate arrests based on grounds that would have invalidated a seizure. They have, however, distinguished between seizures of allegedly obscene material and arrests of alleged distributors. In Milky Way Productions, Inc. v. Leary, 305 F.Supp. 288, 296-97 (S.D.N.Y. 1969) (3 judge court), aff'd, 397 U.S. 98 (1970), individuals had claimed a right to an adversary hearing prior to arrest, just as was then thought to be required prior to a seizure. The court acknowledged that "arrests and prosecutions are likely to deter activities of the kind against which they are directed," but nevertheless concluded that traditional protections of the criminal process were sufficient, and possibly preferred, safeguards for First Amendment rights. Accord Adler v. Pomerleau, 313 F.Supp. 277, 286 (D.Md. 1970) (3 judge court). Those cases involved arrests pursuant to warrants or even after indictment, and thus did not present the issue of warrantless arrests, as the present case does. The rationale is sound, however, and should prevail here.

The major case relied on by Respondent and the Court of Special Appeals did conclude that warrantless obscenity arrests are improper. In Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1353, 1359 (5th Cir. 1980), the Court of Appeals determined that no police officer could ascertain probable obscenity without consulting a judicial officer and, particularly, that the untrained and uninformed officers involved in that case were incapable of making a reasonable determination. Furthermore, the official course of action included widespread warrantless arrests of sales clerks at convenience, food, and drug stores, as well as at adult book stores. The conduct resulted in retailers removing the magazines from the shelves and was found to be a calculated scheme of bad faith harassment, resulting in an informal prior restraint on purveyors of the magazines in the entire Atlanta metropolitan area. The campaign was orchestrated by a prosecutor who publicly promised that other arrests would be made and claimed that his "plan" was working

because no further violations were found. The Fifth Circuit invalidated the plan based on Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

Bantam Books dealt with a Rhode Island Commission that deliberately set out to intimidate book and magazine wholesale distributors and retailers and to cause them to withdraw certain publications from public circulation. It succeeded in achieving its goal by sending notices to distributors that listed the objectionable material, thanked them for cooperating in removing that material, and advised them that non-compliance might result in prosecution. This extreme example of "informal censorship" was found to be an invalid system of prior restraint and was enjoined.

Where, however, there is no intent to intimidate and no real danger of chilling free expression, other courts have declined to find an invalid prior restraint in a warrantless arrest. Most of these cases, like the one before the Court, involved limited use of warrantless arrests and arose in the context of a

motion to suppress or dismiss in a criminal case, rather than in a civil proceeding to enjoin a particular prosecutorial abuse. See, e.g., State v. Flynn, 519 S.W.2d 10, 12 (Mo. 1975); Wood v. State, 240 S.E.2d 743, 744 (Ga.App. 1977); Price v. State, 579 S.W.2d 492, 495 (Tex.Cr.App. 1979). A prior restraint is obviously effected when an item is removed or prohibited from public distribution, as by a confiscatory seizure. It is also possible that a course of official conduct may have a substantial chilling effect meriting injunctive relief. However, the mere use of warrantless arrests, not part of a deliberate, on-going plan to intimidate, does not constitute a prior restraint.

As noted above, the fact of any prosecution may dissuade others from engaging in similar conduct. That alone is not "prior restraint." The Court has already accepted the proposition that the Miller standard is sufficiently definite to "provide fair notice to a dealer in such materials [depicting or

describing patently offensive hard core sexual conduct] that his public and commercial activities may bring prosecution." Miller, 413 U.S. at 27. That distribution of obscenity is illegal does not exert an impermissible chill on First Amendment rights. The unstated assumption is that normal due process protections serve to protect an accused at every step of that prosecution. The special concern of the First Amendment to guard against prior restraints is only triggered when the normal safeguards are inadequate.

For example, in Roaden, it was emphasized that "[a] seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material." 413 U.S. at 501. The inquiry here is whether a warrantless arrest based on trained and experienced officers' evaluation of probable cause to believe that a crime was committed, reasonable generally under the Fourth Amendment, becomes unreasonable because the crime is distribution of obscene material and because the defendant is the cashier in a bookstore.

In Maryland, the arrest of an individual without a warrant prompts an almost immediate appearance before a District Court Commissioner who must release a defendant on unrestricted personal recognizance if there is no probable cause to believe the defendant committed an offense. Rules 4-212(f) and 4-216(c). Even with a probable cause determination, a defendant is entitled to be released on personal recognizance unless the commissioner determines that more restrictions are needed to insure appearance for trial.[10] Rule 4-216(d). Any defendant who remains in custody twenty-four hours after a commissioner determines the conditions of release is immediately brought before a district court judge, who must redetermine conditions of release. Rule 4-216(g). In short, a warrantless arrest results in a very restricted period of custody prior to determination by

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10 Respondent was released on his own recognizance by the commissioner less than three hours after the arrest (R. 5-10).

a judicial officer that there is in fact probable cause to charge the defendant with a crime. Such a minor intrusion, justified here in part by the difficulty in identifying the clerks and the possibility that service of the other arrest warrants might scare them off, was reasonable. In Roaden, the Court recognized that there may be "exigent circumstances in which police action literally must be 'now or never' to preserve evidence of the crime," permitting action without prior judicial evaluation even when the seizure of films is involved. 413 U.S. at 505. And in Heller, the Court recognized the difference between seizures of films for the purpose of destruction or blocking exhibition and seizures for the bona fide purpose of obtaining evidence for prosecution if unaccompanied by an actual restraint on continuing exhibition of the film. 413 U.S. at 492. Thus, the law enforcement need to rely on the normally permitted methods of initiating prosecution, including warrantless arrests, should be reaffirmed.

The warrantless arrest here was not part of a concerted effort merely to harass, or to intimdate the stores into ceasing operations. Indeed, the police worked completely in secret until they thought they had obtained enough evidence to bring the cases to court. Then they endeavored to make all arrests in a short period of time precisely to avoid any chilling effect on the conduct of other clerks. There was no intent - formal or informal - to impose a prior restraint on the operation of the adult bookstores.[11]

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[11] Respondent attempts to magnify the importance of the fact that his arrest caused the closure of Silver News, Inc. for some unidentified period of time on the evening of May 6, 1981. There was no evidence to that effect presented at the motions hearing; only at trial was an officer asked what happened after the arrest. (Under Maryland procedure, review of a suppression motion is limited to evidence presented at the pre-trial hearing, Pharr v. State, 36 Md. App. 615, 618, 375 A.2d 1129, 1131 (1977); Haslup v. State, 30 Md. App. 230, 241, 351 A.2d 181, 187 (1976).) Elsewhere in the motions hearing, it appears that other clerks had been arrested earlier in the day at Silver News, obviously not preventing its operation by Respondent. In any event, it was not the intent of the police to stop distribution of similar material simply by arresting the clerk.

The warrantless arrest here was not shown to interrupt in any meaningful way the public's access to protected material. Respondent's arrest was but the first step in his prosecution for the unlawful distribution of obscene material. The normal requirements of due process afforded any defendant were ample to protect his rights. A warrantless arrest, without more, does not "bring to an abrupt halt an orderly and presumptively legitimate distribution or exhibition," is not an invalid "prior restraint of the right of expression," and is not "unreasonable" under the Fourth Amendment.

III.

THE APPELLATE COURT'S DISMISSAL OF THE CHARGE WAS NOT APPROPRIATE EVEN IF THE MAGAZINES WERE IMPROPERLY ADMITTED IN EVIDENCE AND WITHOUT THEM THE STATE'S EVIDENCE WILL BE INSUFFICIENT.

As its coup de grace, the Court of Special Appeals ordered that the charges be dismissed, citing

Burks v. United States, 437 U.S. 1 (1978), instead of ordering that the case be remanded for a new trial as is ordinarily the remedy for trial error. This too, was wrong and requires correction.[12]

In Burks, of course, the Court held that the double jeopardy clause of the Fifth Amendment bars retrial when an appellate court reverses a conviction for evidentiary insufficiency. Expressly left open in the companion case of Greene v. Massey, 437 U.S. 19, 26 n.9 (1978), was the proper resolution of the double jeopardy concern when, after discounting improperly admitted evidence, the remaining evidence is insufficient. More recent opinions explaining the

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12 Respondent sought dismissal on different grounds, and, as shown in his Brief in Opposition to the Petition for Writ of Certiorari, mistakenly believes that the Court of Special Appeals adopted his theory. Respondent's theory is that he could not commit the crime of distributing obscene material unless at the time he sold the material, it had already been determined to be obscene, thus rendering the evidence insufficient. The court's specific language in citing to Burks, however, indicates that it did not find the evidence insufficient on that ground.

Burks decision and analyzing its rationale make clear that the double jeopardy bar should not be extended to cases where the error causing reversal concerns the admission of evidence, no matter how thin the remaining evidence looks to the reviewing court.

In Justices of Boston Municipal Court v. Lydon, 466 U.S. __, 104 S.Ct. 1805, 1814, 80 L.Ed.2d 311, 325 (1984), the Court focused on the concept of the termination of jeopardy. Unless some identifiable event occurs that constutites the termination of first jeopardy, there can be no impermissible second jeopardy. Burks involved the "significance" of an already existing appellate decision that the evidence presented at trial was insufficient. It was found not to control the very different issue of whether a defendant tried in a two tiered trial system is entitled to a determination of the sufficiency of the evidence at the first tier bench trial before undergoing the second tier jury trial. The Court held that the defendant has no such right. Similarly, in Richardson v. United States,

468 U.S. ___, 104 S.Ct. 3081, 3085, 82 L.Ed.2d 242 (1984), the Court refused to extend Burks to give a defendant, before retrial, a right to a review of the sufficiency of the evidence presented at the first trial that ended in a mistrial due to a hung jury. In both cases, adopting the defendant's position would have required a court to undertake an additional step in the process not otherwise performed. In both cases the Court held that the double jeopardy clause does not require a court to review the evidentiary sufficiency issue.

Similar policy considerations control the issue here. There was no prior determination that the evidence produced at trial was insufficient. The only necessary appellate determination was that trial error occurred when certain evidence was admitted. The appellate court's further conclusion that the State's evidence will be insufficient without the inadmissible evidence involved a review not otherwise performed. It should not be the function of the reviewing court to

decide whether the prosecution can muster other evidence to prove its case, however unlikely that might appear to be. Appellate courts ordinarily sit to review decisions of lower courts, or to determine questions that should or could have been resolved below. Allowing an appellate court to determine sufficiency of the evidence after it has eliminated some of the proof adds a new dimension to the role of the appellate court, that of original arbiter. It would no longer be reviewing an action of the trial court, or passing on the validity of past events. Rather, it would be determining for the first time that the prosecution will be unable to do something in the future. Such a drastic rearrangement of the traditional roles in the criminal justice system is unwarranted when no double jeopardy principle justifies it.

The practical implications of allowing sufficiency rulings on appeal are serious. A prosecutor, with multiple means to prove an essential

element, who is fearful that an appellate court may later find one such piece of evidence inadmissible, would be well advised to offer all available evidence, no matter how redundant, to guard against the kind of result in this case. The cost in terms of trial time alone would be massive. A prosecutor might find it expeditious to offer duplicative evidence even of dubious admissibility to stave off an unfavorable sufficiency ruling, thereby causing reversals that might otherwise not occur.

On the other hand, if the appellate ruling on the admissibility of evidence does leave the prosecutor's case fatally deficient, there will probably be no retrial anyway. The scarcity of resources (to say nothing of professional integrity and pride) discourages prosecutors from trying unmakable cases. In the rare event that an over-zealous prosecutor insists on continuing a case where proof of an essential element may well be lacking, a trial court can ask for a proffer and dismiss if there really is no substitute for the

suppressed evidence. At worst, the defendant must wait until the close of the prosecutor's case for the trial judge to grant a motion for judgment of acquittal. While that defendant will have been subjected to a partial new trial, that is a small hardship when compared to the alternatives.

Ironically, one of the best articulations of the reasons for not applying Burks to this situation appears in the Maryland Court of Appeals' decision in State v. Boone, 284 Md. 1, 12-18, 393 A.2d 1361, 1367-70 (1978) (that court denied review in this case). The court noted how carefully this Court in Burks had distinguished reversal for trial error from reversal for evidentiary insufficiency. The error in the latter situation means that the case should have resulted in entry of an acquittal, an absolutely final disposition. There is no similar conclusion available when trial error causes reversal. Further, it stated:

> "The prosecution, we believe, in proving its case is entitled to rely upon the correctness of the rulings of the court and proceed accordingly. If

> the evidence offered by the State is received after challenge and is legally sufficient to establish the guilt of the accused, the State is not obligated to go further and adduce additional evidence that would be, for example, cumulative. Were it otherwise, the State, to be secure, would have to consider every ruling by the court on the evidence to be erroneous and marshall and offer every bit of relevant and competent evidence. The practical consequences of this would seriously affect the orderly administration of justice, if for no other reason, because of the time which would be required to prepare for trial and try the case. Furthermore, if retrial were precluded because discounting erroneously admitted evidence results in evidentiary insufficiency, there would be no opportunity to correct an error by the court as distinguished from the mistaken belief by the prosecution that it had proved its case. It is in this context, we think, that Burks gave as examples of trial error not invoking the Double Jeopardy Clause with regard to retrial, the 'incorrect receipt or rejection of evidence', along with 'incorrect instructions' and 'prosecutorial misconduct.' Id. [Burks, 437 U.S. at 16]" 284 Md. at 16-17, 393 A.2d at 1369-70.

It may be easy in a case such as the one before the Court to conclude that evidence erroneously

admitted at the first trial is indeed indispensible to successful prosecution. That is not always the case, however, and appellate courts should not undertake to sift the weak cases from the stronger ones. Retrial after appellate reversal is the general rule. The Double Jeopardy bar of Burks is a narrow exception to that rule and does not apply here.

CONCLUSION

Both the First and the Fourth Amendments protect important rights and deserve zealous enforcement. When, however, the police do not search, or seize, or restrain free expression in the constitutional sense, there is no occasion for judicial invocation of the Exclusionary Rule. The Court of Special Appeals of Maryland improperly concluded that the purchase of the obscene magazines was followed by flagrant police misconduct in the warrantless arrest of Respondent and retrieval of the purchase money. The State of Maryland requests that the judgment be reversed.

Respectfully submitted,

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February 28, 1985

APPENDIX

United States Constitution:

Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise therof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV:

SECTION I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Annotated Code of Maryland (1982 Repl.Vol.):

Article 27
OBSCENE MATTER

§417. Definitions.

As used in this subtitle,

(1) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(2) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

(3) 'Distribute' means to transfer possession of, whether with or without consideration.

(4) 'Knowingly' means having knowledge of the character and content of the subject matter.

§418. Sending or bringing into State for sale or distribution; publishing, etc., within State.

Any person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

§424. Penalty.

Violation of this subtitle is punishable upon conviction by fine of not to exceed $1,000 or by imprisonment not to exceed one year, or both unless otherwise provided. Any subsequent conviction of a violation of this subtitle is punishable by a fine of not to exceed $5,000 or by imprisonment not to exceed three years, or both unless otherwise provided.

§425. Destruction of obscene matter.

Upon the conviction of the accused, the court, when the conviction becomes final, may order any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the State's attorney or any law enforcement agency, to be destroyed, and the court may cause to be destroyed any such material in its possession or under its control.

Maryland Rules of Procedure
(Currently in effect)

Rule 4-211. Filing of Charging Document.

* * *

(b) Statement of Charges. -

* * *

(2) After Arrest. - When a defendant is arrested without a warrant, the officer who has custody of the defendant shall forthwith cause a statement of charges to be filed against the defendant in the District Court. At the same time or as soon thereafter as is practicable, the officer shall file an affidavit containing facts showing probable cause that the defendant committed the offense charged.

Rule 4-212. Issuance, Service, and Execution of Summons or Warrant.

* * *

(f) Procedure - When Defendant in Custody. -

(1) Same Offense. - When a defendant is arrested without a warrant, the defendant shall be taken before a judicial officer of the District Court without unnecessary delay and in no event later than 24 hours after arrest. When a charging document is filed in the District Court for the offense for which the defendant is already in custody a warrant or summons need not issue. A copy of the charging document shall be served on the defendant promptly after it is filed, and a return shall be made as for a warrant. When a charging document is filed in the circuit court for an offense for which the defendant is already in custody, a warrant issued pursuant to section (d)(2) of this Rule may be lodged as a detainer

for the continued detention of the defendant under the jurisdiction of the court in which the charging document is filed. Unless otherwise ordered pursuant to Rule 4-216, the defendant remains subject to conditions of pretrial release imposed by the District Court.

Rule 4-213. Initial Appearance of Defendant.

(a) In District Court Following Arrest. - When a defendant appears before a judicial officer of the District Court pursuant to an arrest, the judicial officer shall proceed as follows:

(1) Advice of Charges. - The judicial officer shall inform the defendant of each offense with which the defendant is charged and shall provide the defendant with a copy of the charging document if the defendant does not already have one and one is then available. If one is not then available, the defendant shall be furnished with a copy as soon as possible.

(2) Advice of Right to Counsel. - The judicial officer shall require the defendant to read the notice to defendant required to be printed on charging documents in accordance with Rule 4-201(a), or shall read the notice to a defendant who is unable for any reason to do so. A copy of the notice shall be furnished to a defendant who has not received a copy of the charging document.

(3) Pretrial Release Determination. - The judicial officer shall determine the defendant's eligibility for pretrial release pursuant to Rule 4-216.

(4) Advice of Preliminary Hearing. - When a defendant has been charged with a felony that is not within the jurisdiction of the District Court and has not been indicted, the judicial officer shall advise the defendant of the right to have a preliminary hearing by

a request made then or within ten days thereafter and that failure to make a timely request will result in the waiver of a preliminary hearing. If the defendant then requests a preliminary hearing, the judicial officer may either set its date and time or notify the defendant that the clerk will do so.

(5) Certification by Judicial Officer. - The judicial officer shall certify compliance with this section in writing.

(6) Transfer of Papers by Clerk. - As soon as practicable after the initial appearance by the defendant, the judicial officer shall file all papers with the clerk of the District Court or shall direct that they be forwarded to the clerk of the circuit court if the charging document is filed there.

Rule 4-216. Pretrial Release.

(a) When Available. - Unless ineligible for pretrial release under Code, Article 27, §616 1/2, (1) a defendant charged with an offense for which the maximum penalty is neither death nor life imprisonment is entitled to be released before verdict or pending a new trial in conformity with this Rule, and (2) a defendant charged with an offense for which the maximum penalty is death or life imprisonment may, in the discretion of the court, be released before verdict or pending a new trial in conformity with this Rule.

* * *

(c) Probable Cause Determination. - A defendant arrested without a warrant shall be released on personal recognizance under terms that do not significantly restrain the defendant's liberty unless the judicial officer determines that there is probable cause to believe that the defendant committed an offense.

(d) Conditions of Release. - A defendant charged with an offense for which the maximum penalty is neither death nor life imprisonment shall be released before verdict or pending a new trial on personal recognizance unless the judicial officer determines that that condition of release will not reasonably ensure the appearance of the defendant as required. Upon determining to release a defendant charged with an offense for which the maximum penalty is death or life imprisonment or to refuse to release a defendant charged with a lesser offense on personal recognizance the judicial officer shall state the reasons in writing or on the record and shall impose the first of the following conditions of release which will reasonably ensure the appearance of the defendant as required, or, if no single condition is sufficient, the judicial officer shall impose on the defendant that combination of the following conditions which is not onerous but which reasonably ensure the defendant's appearance as required:

(1) Committing the defendant to the custody of a designated person or organization agreeing to supervise the defendant and assist in ensuring the defendant's appearance in court;

(2) Placing the defendant under the supervision of a probation officer or other appropriate public official;

(3) Subjecting the defendant to reasonable restrictions with respect to travel, association, or residence during the period of release;

(4) Requiring the defendant to post a bail bond complying with Rule 4-217 in an amount and on conditions specified by the judicial officer including any of the following:

(A) without collateral security,

(B) with collateral security of the kind specified in Rule 4-217(e)(1) as equal in value to the greater of the $25.00 or 10% of the full penalty amount, or a larger percentage as may be fixed by the judicial officer,

(C) with collateral security of the kind specified in Rule 4-217(e)(1) equal in value to the full penalty amount,

(D) with the obligation of a corporation which is an insurer or other surety in the full penalty amount;

(5) Subjecting the defendant to any other condition reasonably necessary to ensure the appearance of the defendant as required.

* * *

(g) Review of Commissioner's Pretrial Release Order. - A defendant who is denied pretrial release by a commissioner or who for any reason remains in custody for 24 hours after a commissioner has determined conditions of release pursuant to this Rule shall be presented immediately to the District Court if the court is then in session, or if not, at the next session of the court. The District Court shall review the commissioner's pretrial release determination and take appropriate action thereon. If the defendant will remain in custody after the review, the District Court shall set forth in writing or on the record the reasons for the continued detention.

Maryland District Rules
(in effect May 6, 1981)

Rule 720. Issuance, Service and Execution of Charging Document.

a. Statement of Charges After Arrest.

When a defendant is arrested without a warrant, the officer who has custody of the defendant shall forthwith cause a statement of charges to be filed against the defendant. For the purpose of considering pretrial release of the defendant, the officer shall at the same time, or as soon thereafter as is practicable, file a verified statement of facts showing probable cause that the defendant committed the offense charged.

* * *

h. When Defendant is in Custody.

1. For Same Offense.

A warrant or summons need not issue upon the filing of a charging document if the defendant is in custody only for the same offense at the time the charging document is filed. A copy of the charging document shall be served on the defendant as soon as possible after it is filed, and the peace officer who served it shall make a prompt return of service to the court which shows the date, time and place of service.

Rule 721. Pretrial Release.

a. When Available.

Before conviction or pending a new trial, a defendant charged with an offense for which the maximum penalty is neither death nor life imprisonment is entitled to be released pending trial,

subject to the provisions of this Rule. A defendant charged with an offense for which the maximum penalty is death or life imprisonment may be released pending trial in the discretion of the court. This Rule does not appely to defendants ineligible for pretrial release under Article 27, section 616 1/2(c), of the Maryland Code.

* * *

f. Review of Pretrial Release Order.

If pretrial release is denied by a commissioner, or if for any reason the defendant remains in custody for 24 hours after a commissioner has determined conditions of release pursuant to this Rule, the defendant shall be brought immediately before a court if the court is then in session, or if not, at the next session of the court that follows the denial of pretrial release of the expiration of the 24 hours. The court shall review the commissioner's pretrial release determination and shall take appropriate action thereon. If the defendant will continue to remain in custody after the review, the court shall set forth in writing or on the record the reasons for requiring the continued detention.

Rule 723. Initial Appearance.

a. After Arrest.

A defendant who is detained pursuant to an arrest shall be taken before a judicial officer without unnecessary delay and in no event later than 24 hours after arrest. A charging document shall be filed promptly after arrest if not already filed.

b. Procedure.

At the initial appearance of the defendant, the judicial officer shall proceed as provided in this section.

* * *

4. Probable Cause Determination.

When a defendant has been arrested without a warrant, the judicial officer may not impose conditions of pretrial release which impose a significant restraint on the liberty of the defendant until the judicial officer determines that there is probable cause to believe that the defendant committed an offense. If the judicial officer does not find probable cause, the defendant shall be released on his own recognizance under terms which do not significantly restrain his liberty.

No. 84-778 (5)

In the Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF MARYLAND, PETITIONER

v.

BAXTER MACON

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a police officer's entry into the public area of a commercial store and his purchase once inside of items freely offered for sale by the store constitutes a search or seizure regulated by the First or Fourth Amendment.

2. Whether a warrant is required to arrest an individual for the distribution of obscene materials.

3. Whether the Double Jeopardy Clause bars retrial of a defendant following reversal of his conviction on the ground that certain evidence critical to the sufficiency of the prosecution's case was improperly admitted at the first trial.

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INTEREST OF THE UNITED STATES

This case raises two important questions concerning the constitutional limitations, under the First and Fourth Amendments, on the ability of law enforcement officers to conduct investigations into the distribution of obscene materials. Several federal statutes govern the dissemination of obscene materials in interstate commerce and through the mails, 18 U.S.C. 1461, 1462, and 1465, and the federal government therefore has an interest in the constitutional principles that regulate this class of cases. The third question presented by the petition raises an issue under the Double Jeopardy Clause that would apply to any type of federal prosecution.

STATEMENT

Following a jury trial in the Prince George's County, Maryland, Circuit Court, petitioner was convicted of distributing obscene materials, in violation

of Md. Code Ann. art. 27, § 418 (1982) (Pet. App. 1a). Petitioner was fined $500 and was ordered to pay $75 in court costs (*ibid.*). On petitioner's appeal, the Maryland Court of Special Appeals reversed his conviction and ordered that the charging papers be dismissed (Pet. App. 1a-19a).

1. At approximately 7:00 p.m. on May 6, 1981, three Prince George's County detectives went to the Silver News, Inc., adult book store in Hyattsville, Maryland, in response to a series of complaints that the store had been selling adult books to juveniles (Tr. 77-78; see J.A. 39). The store windows were covered with paper to a point above the eye level of a person of average height (Tr. 79), so that passers-by could not see inside, but the store was apparently open to any member of the public interested in browsing or purchasing a book or magazine. Detective Ray Evans entered the store, browsed for a few minutes, and selected two magazines, which he purchased with a marked $50 bill supplied by the vice section (J.A. 38; Tr. 79, 81-84, 93-94, 112, 125).[1] After leaving the store, he showed the magazines to two other detectives waiting nearby (J.A. 29, 36; Tr. 84, 114), who concluded that the magazines were obscene under the criteria that they had previously used in warrant applications (J.A. 28; Tr. 84, 89-90). All three detectives returned to the store and arrested respondent, the only employee in the store,[2] for distributing obscene materials, in violation of Md. Code Ann. art. 27, § 418 (J.A. 27, 34-36; Tr. 112-113, 116-117). The detectives also recovered the $50

[1] The magazines were in an unsealed plastic container (Pet. App. 1a; Tr. 82-83, 86).

[2] Neither the circuit court nor the Court of Special Appeals made a finding as to whether respondent was the proprietor of the store or merely an employee.

bill that Detective Evans had used to purchase the magazines (J.A. 36, 37; Tr. 124). Respondent ushered out the remaining customers and locked the store before he was taken away by the detectives (Pet. App. 2a).

2. Prior to trial, respondent moved to suppress the magazines and the $50 bill on several different grounds (J.A. 4, 9-11, 17-20). After an evidentiary hearing,[3] the circuit court denied respondent's motion in an oral bench ruling (J.A. 39-45). The court held that Detective Evans' purchase of the magazines did not constitute a seizure (J.A. 41) and that respondent's warrantless arrest was lawful (J.A. 41-43). At respondent's trial, the State offered the magazines in evidence (Tr. 88), but it did not introduce the $50 bill seized incident to his arrest.

3. On respondent's appeal, the Maryland Court of Special Appeals reversed his conviction and ordered that the charging papers be dismissed (Pet. App. 1a-19a). Stating that the "primary question" was whether the detectives' warrantless arrest of petitioner was lawful (*id.* at 4a), the court ruled (*id.* at 4a-12a) that, because of the complexity of the definition of obscenity and the need to ensure that protected speech is not stifled, the First Amendment forbids the warrantless arrest of a person for distributing allegedly obscene materials. The court also rejected the State's argument that suppression was uncalled for because Detectives Evans had purchased the magazines. The purchase, according to the court, was a " 'preconceived seizure[]' " (*id.* at 13a (citation omitted)), and the entire episode was a "constructive[] seiz[ure]" of respondent's maga-

[3] The hearing on respondent's motion was combined with a hearing on several similar motions filed by other defendants who had also been charged in other cases with distributing obscene materials (see J.A. 39).

zines (*id.* at 14a). Suppression was also appropriate, the court ruled (*id.* at 17a-18a), because the arrest caused respondent to close the bookstore. In an effort to lessen the impact of its holding, the court expressly noted (*id.* at 19a n.2) that its ruling was based solely upon the First Amendment and did not constitute a modification of established Fourth Amendment doctrine. Finding that, without the magazines, the evidence was insufficient to support respondent's conviction, the court ordered that the charging documents be dismissed (Pet. App. 19a, citing *Burks* v. *United States*, 437 U.S. 1 (1978)). The Maryland Supreme Court denied review, and this Court granted the State's petition for a writ of certiorari on January 14, 1985.

SUMMARY OF ARGUMENT

1. The Court of Special Appeals erred in holding that the magazines purchased by the detectives must be suppressed. Law enforcement officers do not need a warrant to enter the public areas of a commercial building or to purchase items that the business freely sells. The detectives' possession of the magazines was thus not a seizure regulated by the Fourth Amendment. Nor does the First Amendment provide any basis for suppressing this evidence. The First Amendment does not generate a legitimate expectation of privacy either in general or as to the type of premises that the officers entered in this case. Indeed, its purpose is just the opposite: to protect the right of public dissemination of ideas. Moreover, the First Amendment contains no exclusionary rule, and it surely does not require that conduct that was entirely lawful at the time it occurred retroactively be deemed unlawful.

2. There is no need to decide in this case whether a law enforcement officer may effect a warrantless

arrest of a suspect for the distribution of obscene materials. Even if respondent was unlawfully arrested, the detectives were nonetheless legitimately in possession of the magazines introduced at trial, and the only evidence that the detectives secured by virtue of respondent's arrest was not received in evidence at trial. Because there were no "fruits" of that arrest admitted into evidence, it is immaterial to this case whether respondent's arrest was lawful.

In any event, respondent's arrest was lawful. The Fourth Amendment allows the police to make warrantless arrests if no search of a private area is needed to effect the arrest. The First Amendment does not forbid this practice because a warrantless arrest for the distribution of obscene materials, unlike a seizure of those items, is not tantamount to a prior restraint. Moreover, because the Fourth Amendment requires a magistrate promptly to determine whether a warrantless arrest was supported by probable cause, a law enforcement officer's judgment that certain publications or films are obscene will not go unreviewed.

3. The petition also presents the question whether, once an appellate court has determined that certain evidence critical to the sufficiency of the prosecution's case was erroneously admitted, the Double Jeopardy Clause bars retrial on that charge. The Court would need to reach this issue only if it first upholds the ruling of the court below that the magazines were improperly admitted. Even in that event, however, we believe that this is not an appropriate case in which to resolve this important issue of double jeopardy law because a decision on that issue in the State's favor will not enable the State to conduct a retrial of the respondent if it cannot use the evidence that

the court below ordered suppressed. Respondent was charged with distributing obscene materials, and it appears to be legally impossible to prove such a charge without some evidence of the distribution of or the contents of the magazines; indeed, the State has not suggested that there is in fact any way for it to proceed with a retrial even if it were permitted to do so. Accordingly, this issue is of mere academic interest to the parties and need not be resolved in this case.

Should the Court reach the issue, however, we think it clear that the Double Jeopardy Clause does not bar a retrial at which the prosecution would be free to offer other evidence, if such evidence were available, to substitute for the evidence that was erroneously admitted at the first trial. When a court finds that all of the evidence adduced at the first trial fails to prove a defendant's guilt and the court enters a judgment of acquittal, the policy of the Double Jeopardy Clause to protect a defendant from further prosecution is applicable. Here, however, the evidence at trial, though perhaps legally defective for reasons unrelated to the historic fact of respondent's guilt or innocence, can hardly be said to have failed to establish his guilt. The relevant double jeopardy policy is therefore not implicated by allowing a retrial. If the prosecution can substitute other, legally-competent evidence for the evidence that was improperly admitted at a defendant's first trial, society's interest in convicting the guilty outweighs any possible interest the defendant can invoke against retrial.

ARGUMENT

I. THE MARYLAND COURT OF SPECIAL APPEALS ERRED BY SUPPRESSING THE MAGAZINES PURCHASED BY THE DETECTIVES

In this case, the Maryland Court of Special Appeals held that the magazines purchased by Detective Evans must be suppressed because respondent's ensuing warrantless arrest for the distribution of obscene materials was unlawful. That analysis, in our opinion, is seriously flawed in several respects. For the reasons given below, because neither the Fourth nor the First Amendment requires a law enforcement officer to obtain a warrant before purchasing books or magazines from a store, the detectives were lawfully in possession of the magazines that were introduced in evidence at respondent's trial. Nothing in this Court's jurisprudence or sound policy justifies collapsing this lawful conduct into the subsequent events or dispensing with the uniform precondition to suppression of evidence that its procurement be causally related to the alleged illegality. Accordingly, it is immaterial to this case whether respondent was lawfully arrested.

A. Law Enforcement Officers Do Not Need To Obtain A Warrant Before Entering The Public Areas Of A Commercial Building And Purchasing Items That Are Freely Offered For Sale

1. The Fourth Amendment does not regulate every action that a law enforcement officer takes in investigating crime; rather, the Amendment, by its terms, applies only to "searches and seizures." Those terms limit the scope of the Fourth Amendment and, in so doing, also describe different types of conduct: a search occurs only when the government intrudes on a person's legitimate expectation of privacy, while a

seizure takes place when the government substantially interferes with a person's liberty or his possessory interests in property. See, *e.g.*, *Hudson* v. *Palmer*, No. 82-1630 (July 3, 1984), slip op. 7; *United States* v. *Karo*, No. 83-850 (July 3, 1984), slip op. 6-7; *United States* v. *Jacobsen*, No. 82-1167 (Apr. 2, 1984), slip op. 3; *Smith* v. *Maryland*, 442 U.S. 735, 740-741 (1979). The Fourth Amendment also does not permit the courts to adopt an undifferentiated approach to the question whether a sequence of discrete actions taken by the police constitute either a search or a seizure. On the contrary, the Court's decisions make clear that each action must be separately examined to determine whether it falls within the scope of the Fourth Amendment. See, *e.g.*, *United States* v. *Karo*, slip op. 6-12; *United States* v. *Jacobsen*, slip op. 8-16; *United States* v. *Knotts*, 460 U.S. 276, 282-283 (1983).

Here, Detective Evans entered respondent's bookstore, browsed for a few moments, and purchased two magazines before conferring with his partners and, ultimately, deciding to arrest respondent. The only evidence that the detectives secured as the product of respondent's arrest, however, was the original $50 bill that Detective Evans had used to purchase the magazines, and that bill was not introduced in evidence at trial. Hence, because there were no "fruits" of that arrest admitted at trial, there is no reason for the Court to decide whether respondent's warrantless arrest was lawful, and, unless Detective Evans committed an unlawful search or seizure to obtain the magazines prior to respondent's arrest, there is no basis for invoking the exclusionary rule in this case.

a. To begin with, it is clear that Detective Evans' entry into respondent's store did not constitute a

search. Even though law enforcement officers are normally required to obtain a search warrant before inspecting the private areas of a business (see, *e.g.*, *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978)), it is well established that police officers, like private parties, are entitled to accept a business's general invitation to the public to enter its commercial premises, even if the officers do not intend to transact business. See *Donovan* v. *Lone Steer, Inc.*, No. 82-1684 (Jan. 17, 1984), slip op. 5; *Lewis* v. *United States*, 385 U.S. 206, 211 (1966); *id.* at 213 (Brennan, J., concurring); cf. *Oliver* v. *United States*, No. 82-15 (Apr. 17, 1984) (open fields surrounding a house); *Air Pollution Variance Bd.* v. *Western Alfalfa Corp.*, 416 U.S. 861 (1974) (open fields surrounding a business); see generally *Katz* v. *United States*, 389 U.S. 347, 351 (1967) ("[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection").[4] Moreover, because "[a] commercial

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[4] As the Court explained in *Lewis*, "[a] government agent, in the same manner as a private person, may accept an invitation to do business and enter upon the premises for the very purposes contemplated by the occupant" (385 U.S. at 211). See also *Northside Realty Associates, Inc.* v. *United States*, 605 F.2d 1348, 1354-1355 (5th Cir. 1979); *United States* v. *Brandon*, 599 F.2d 112, 113 (6th Cir.), cert. denied, 444 U.S. 837 (1979); *United States* v. *Blalock*, 578 F.2d 245, 247 (9th Cir. 1978); *United States* v. *Berrette*, 513 F.2d 154, 156 (1st Cir. 1975); *United States* v. *Berkowitz*, 429 F.2d 921, 925 (1st Cir. 1970); *United States* v. *Williams*, 328 F.2d 887 (2d Cir.) (per curiam), cert. denied, 379 U.S. 850 (1964); *Fisher* v. *United States*, 205 F.2d 702 (D.C. Cir.), cert. denied, 346 U.S. 872 (1953); Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 357 (1974). It is immaterial in this respect whether the invitation is viewed as an indication that the proprietor has no expectation of privacy under *Katz* in the public areas of his premises or as consent

establishment when open to the public is open for all legitimate purposes" (*United States* v. *Berkowitz*, 429 F.2d 921, 925 (1st Cir. 1970)), so long as the officers do not exceed the limits of their invitation—for instance, by entering after business hours or by rummaging through a firm's business records—they may lawfully observe whatever is in plain view once they are inside. See *Marshall* v. *Barlow's, Inc.*, 436 U.S. at 315 (footnote omitted) ("[w]hat is observable by the public is observable, without a warrant, by the Government inspector as well"). Finally, that law enforcement officers are not in uniform when they enter the premises is immaterial in this regard, because the Fourth Amendment does not protect a person's misplaced confidence that the persons with whom he transacts business are neither the police nor a threat to his criminal activities. See *United States* v. *Karo*, slip op. 10 n.4; *id.* at 3-4 (O'Connor, J., concurring in part and concurring in the judgment); *United States* v. *White*, 401 U.S. 745, 752 (1971) (plurality opinion); *Osborn* v. *United States*, 385 U.S. 323, 326-331 (1966); *Hoffa* v. *United States*, 385 U.S. 293, 300-303 (1966); *Lewis* v. *United States*, *supra*; *Lopez* v. *United States*, 373 U.S. 427, 437-439 (1963). The detective's presence in respondent's bookstore was thus entirely lawful.

b. Nor did Detective Evans' purchase of the two magazines constitute a seizure for purposes of the Fourth Amendment. The sale of an item, like the abandonment of that item, necessarily entails the owner's relinquishment of any further possessory interest. A police officer's purchase of a magazine, like his purchase of narcotics, therefore implicates no

to the public to enter his premises. See *United States* v. *Karo*, slip op. 3 (O'Connor, J., concurring in part and concurring in the judgment).

Fourth Amendment concern. See *Texas* v. *Brown*, 460 U.S. 730, 748 (1983) (Stevens, J., concurring in the judgment); *Lewis* v. *United States*, 385 U.S. at 211; *Abel* v. *United States*, 362 U.S. 217, 241 (1960) (abandonment); cf. *United States* v. *Matlock*, 415 U.S. 164 (1974) (consent). Hence, unless the First Amendment requires a different result, the detectives were lawfully in possession of the magazines prior to respondent's arrest, and the Court of Special Appeals erred in ordering that evidence to be suppressed.[5]

2. The Court of Special Appeals' reversal of respondent's conviction hinges upon its conclusions that the First Amendment establishes different rules for police conduct in this area (Pet. App. 19a n.2) and that the two magazines purchased by Detective Evans must be suppressed to ensure that respondent would not lack a remedy for what it found to be an illegal arrest in this case (Pet. App. 12a-15a). That analysis is unsound.

a. To begin with, the First Amendment does not bar undercover law enforcement officers from enter-

[5] Most state courts to consider the question have ruled in similar circumstances that a law enforcement officer's purchase of a book or a similar item for the purpose of determining whether it is obscene does not constitute a seizure of the item. See *Peachtree News Co.* v. *Slaton*, 226 Ga. 471, 472-474, 175 S.E.2d 539, 540 (1970); *People* v. *Ridens*, 51 Ill.2d 410, 416-417, 282 N.E.2d 691, 695 (1972), vacated and remanded on other grounds, 413 U.S. 912 (1973); *State* v. *Welke*, 216 N.W.2d 641 (Minn. 1974); *State* v. *Flynn*, 519 S.W.2d 10, 12 (Mo. 1975); *State* v. *Dornblaser*, 26 Ohio Misc. 29, 35-37, 267 N.E.2d 434, 438 (1971); *Cherokee News & Arcade, Inc.* v. *State*, 533 P.2d 624, 626 (Okla. Crim. App. 1974); *Goodwin* v. *State*, 514 S.W.2d 942, 944 (Tex. Crim. App. 1974); cf. *State* v. *Barrett*, 278 S.C. 92, 97-98, 292 S.E.2d 590, 593, cert. denied, 459 U.S. 1021 (1982) (no seizure under state law). Contra, *State* v. *Furuyama*, 64 Hawaii 109, 637 P.2d 1095 (1981).

ing the public areas of a commercial building or from purchasing items that a business freely offers for sale. The principal purpose of the First Amendment, of course, is protection of the *public expression* of ideas. Although the First Amendment, in some circumstances, protects privacy of belief or association where doing so is essential for effective political expression (see *Buckley* v. *Valeo*, 424 U.S. 1, 64-66 (1976)), the First Amendment merely protects legitimate expectations of privacy that stem from an independent source. The First Amendment does not by itself give rise to a privacy interest where no reasonable person could expect one (cf. *Rakas* v. *Illinois*, 439 U.S. 128, 143 n.12 (1978)), and there surely is no basis for concluding that the proprietors or employees of a commercial establishment that is open to the public possess a legitimate expectation of privacy in this regard. Where a business invites the public, either expressly or by necessary implication, to enter upon the premises at will, as respondent did in this case, the invitation demonstrates that the proprietors, and, a fortiori, the employees, do not expect to retain a privacy interest in the open portions of the business premises. If so, there is plainly no reason for the First Amendment independently to give rise to an expectation of privacy that the proprietors and employees themselves do not possess.

That Detective Evans purchased the magazines " 'as part of a single planned transaction' " (Pet. App. 13a (citation omitted)) is also immaterial in this regard. As the Court made clear in *Scott* v. *United States*, 436 U.S. 128, 136 (1978) (emphasis in original), while a police officer's "motives may play some part in determining whether application of the exclusionary rule is appropriate *after* a * * * constitutional violation has been established," the question whether

a constitutional violation has occurred "turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time." See also *id.* at 137-138. For that reason, Detective Evans' intent at the time he entered respondent's store or when he purchased the magazines is irrelevant to the question whether those actions constituted a search or seizure.

To be sure, it is established that First Amendment concerns should be taken into account in determining what is reasonable under the Fourth Amendment (see *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965)), so that in some circumstances there are special rules applicable to searches for or seizures of books, films, or papers. See, *e.g.*, *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 564 (1978); *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964); *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961). But these remain Fourth Amendment rules, and they govern only conduct that constitutes a search or a seizure. Accordingly, unless a law enforcement officer's conduct can reasonably be classified as either a search or a seizure, the Fourth Amendment, even as amplified by the First, does not regulate that activity.

b. The Court of Special Appeals also erred by retrospectively applying the exclusionary rule in blatant disregard of the normal cause-and-effect relationship between events. As this Court explained only last Term, "[i]t is clear that the cases implementing the Exclusionary Rule 'begin with the premise that the challenged evidence is *in some sense* the product of illegal governmental activity.' " *Nix* v. *Williams*, No. 82-1651 (June 11, 1984), slip op. 11 (emphasis in original), quoting *United States* v. *Crews*, 445 U.S. 463, 471 (1980); see also, *e.g.*, *Segura* v. *United States*, No. 82-5298 (July 5, 1984), slip op. 17-20;

McGuire v. *United States*, 273 U.S. 95, 98-100 (1927). The First Amendment plainly does not require a different result. Because Detective Evans' purchase of the magazines violated no First or Fourth Amendment right of respondent's, there is no reason to exclude them from evidence at trial. Cf. *United States* v. *Payner*, 447 U.S. 727, 734-737 (1980) (suppression is equally inappropriate under the Fourth Amendment or a federal court's supervisory powers where the government's conduct violated no right of the defendant). What is more, even if the First Amendment were to require that evidence obtained in violation of its strictures be suppressed in some instances, there is surely no rational basis for a rule that the First Amendment requires suppression of validly obtained evidence because of some later, causally-unrelated infringement of First Amendment rights.[6] The Court of Special Appeals therefore erred by ordering the magazines to be suppressed.

To be sure, respondent, like any citizen, may be entitled to be free from harassment or from an improperly motivated investigation. But the court of appeals did not point to any evidence in this case that

[6] There also appears to be no basis at this time for the court's forecast that "permit[ting] the warrantless arrest in this case to go unremedied would merely license a continuation of this practice" of making warrantless arrests for the distribution of obscene materials (Pet. App. 18a). Prior to the court's decision, state law enforcement officers were not required to obtain a warrant to arrest a suspect for the distribution of obscene materials, and there is surely no reason to presume that police officers will ignore judicial decisions limiting police investigatory practices. While there is, as we show below, no need in this case to decide whether a warrant is required in such circumstances, there is also no need to exclude evidence that law enforcement officers have lawfully obtained prior to the existence of such a ruling, on the ground that the police will later ignore the new rule.

would support such a claim—it did not, for instance, question that respondent in fact committed the offense for which he was arrested—and there is no reason to presume that the detectives' actions were spurred by illegitimate concerns. The only action taken by the detectives that the Court of Special Appeals found offensive to any constitutional value was their warrantless arrest of respondent. Whatever effect that may have on respondent's prosecution as a matter of state law, it is entirely clear there is no basis in either the First or Fourth Amendment for the court's ruling requiring suppression of the magazines that respondent freely parted with prior to his arrest.[7]

[7] The Court of Special Appeals also erred in relying upon *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963), and *Penthouse Int'l, Ltd.* v. *McAuliffe*, 610 F.2d 1353 (5th Cir.), cert. dismissed, 447 U.S. 931 (1980). In *Bantam Books*, a state commission sent notices to book distributors that certain books were obscene, which, the state trial court found, had the effect of compelling the distributors to cease selling the books to retailers and to withdraw all outstanding books from retailers. 372 U.S. at 63-64. Accepting the trial court's finding that a distributor's "compliance with the Commission's directives was not voluntary" (372 U.S. at 68), the Court ruled that the Commission's directives constituted an unlawful prior restraint (*id.* at 68-72). Detective Evans' purchase of books freely offered for sale is not remotely similar to the facts of *Bantam Books*. The Fifth Circuit's decision in *Penthouse Int'l* upheld a district court's issuance of an injunction where the activities of local law enforcement authorities in making warrantless arrests after purchasing allegedly obscene magazines "constituted a calculated scheme of warrantless arrests and harassing visits to retailers" (610 F.2d at 1361) that amounted to a "constructive seizure" of the magazines (*id.* at 1359) and an unlawful prior restraint under *Bantam Books* (610 F.2d at 1359-1362). The court did not find that the purchases themselves were unlawful or suggest that items purchased by law enforcement officers would be subject to suppression at trial; rather, the court was con-

B. The Question Whether Respondent Was Lawfully Arrested Will Not Affect The Outcome Of This Case And Therefore Ought Not To Be Resolved In This Proceeding

1. For the reasons given above, the detectives lawfully possessed the magazines that were purchased from respondent's store, and the state circuit court therefore properly admitted those items in evidence at respondent's trial. The only evidence that the detectives acquired by virtue of respondent's arrest was the $50 bill that they had used to purchase the magazines, but that bill was not received in evidence. It is thus unnecessary for the Court to decide at this time whether the First or Fourth Amendment requires that a neutral and detached magistrate, rather than a law enforcement officer, assess the sufficiency of the evidence to arrest a suspect for distributing obscene materials. There will be time enough to resolve the arrest issue in a case that requires it; this one, however, does not.

2. Were that question before the Court, however, we would submit that neither the First nor the Fourth Amendment requires an antecedent judicial determination of probable cause to arrest a person for the sale of obscene materials.

a. The Court's decisions construing the Fourth Amendment Warrant Clause recognize a sharp constitutional distinction between searches and seizures. As noted above (pages 7-8, *supra*), a search involves an interference with a person's legitimate expectations of privacy. Because "the ruptured privacy of the victims' homes and effects cannot be restored" once an unlawful search has occurred (*Linkletter* v.

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cerned with the legality of the warrantless arrests, which need not be decided in this case.

Walker, 381 U.S. 618, 637 (1965)), law enforcement officers are generally required to secure a warrant before they may conduct a search (see, *e.g.*, *United States* v. *Karo*, slip op. 11). A seizure, by contrast, represents an interference with an individual's possessory interests in property. The consequences of an erroneous seizure—deprivation of possession of the property—are not nearly as severe as in the case of an erroneous search and are remediable by ordering restoration of unlawfully seized property to its owner. See Fed. R. Crim. P. 41. For that reason, law enforcement officers may ordinarily seize property in plain view without a warrant if they have probable cause to believe that it is either contraband or evidence of a crime. See *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983), slip op. 6; *United States* v. *Jacobsen*, slip op. 11-12; *Texas* v. *Brown*, 460 U.S. 730, 738, 741-742 (1983) (plurality opinion); *id.* at 748 (Stevens, J., concurring in the judgment); *Payton* v. *New York*, 445 U.S. 573, 587 (1980); *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 354 (1977). Indeed, the Fourth Amendment allows the police to make a warrantless, probable-cause seizure of a person (*i.e.*, an arrest) in a public place. See *United States* v. *Santana*, 427 U.S. 38, 41-42 (1976); *United States* v. *Watson*, 423 U.S. 411 (1976).[8]

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[8] While the Court has never directly addressed the issue, its decisions have clearly indicated that a police officer may also make a warrantless arrest for a misdemeanor committed in his presence. See *Welsh* v. *Wisconsin*, No. 82-5466 (May 15, 1984), slip op. 1 (White, J., dissenting); *United States* v. *Watson*, 423 U.S. at 418; *Carroll* v. *United States*, 267 U.S. 132, 156-157 (1925); cf. *New Jersey* v. *T.L.O.*, No. 83-712 (Jan. 15, 1985), slip op. 16 n.9; see also 2 W. LaFave, *Search and Seizure* § 5.1 (1978); W. LaFave, *Arrest* 17 (1965). Article 27, Section 594B, of Maryland Code authorizes a police officer to make a warrantless arrest for a misdemeanor committed in the officer's presence. See Pet. 3.

However, because First Amendment considerations must be taken into account in defining what is reasonable under the Fourth Amendment (page 13, *supra*), the Court has recognized an exception from the latter rule for books or similar materials and has required a judicial determination of probable cause before such items may be seized. See *Roaden* v. *Kentucky*, 413 U.S. 496, 502-503 (1973) (collecting cases). As the Court explained in *Roaden*, "the common thread * * * [of those decisions] is to be found in the nature of the materials seized and the setting in which they were taken" (413 U.S. at 503). The Fourth Amendment requires antecedent judicial review of the sufficiency of the evidence to support a seizure of books because a seizure is tantamount to a prior restraint of communications that may be protected by the First Amendment (see 413 U.S. at 503-504; see also *Zurcher* v. *Stanford Daily*, 436 U.S. at 566-567), a harm equal in degree to that resulting from an unlawful search.

b. Contrary to the view of the Court of Special Appeals, however, that exception cannot automatically be applied in the context of an arrest. Rather, the Court's decisions make clear that, because "the overarching principle * * * embodied in the Fourth Amendment" is one of " 'reasonableness' " (*United States* v. *Villamonte-Marquez*, No. 81-1350 (June 13, 1983), slip op. 9), which "is not capable of precise definition or mechanical application" (*Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979)), the specific context in which an issue arises must be closely examined in order to balance the particular interests involved (see, *e.g.*, *New Jersey* v. *T.L.O.*, No. 83-712 (Jan. 15, 1985), slip op. 10; *United States* v. *Villamonte-Marquez*, slip op. 9, 13-14; *Terry* v. *Ohio*, 391 U.S. 1, 9 (1968)). We submit that, on balance, the rule

adopted by the Court of Special Appeals is unwarranted.

The Court of Special Appeals concluded (Pet. App. 17a-18a) that the warrantless arrest of respondent was tantamount to a prior restraint because it caused him to close the bookstore. A warrantless arrest does not directly or inevitably lead to that result, however. That it did in this case was purely fortuitous because respondent happened to be the only employee in the store at the time. But *any* arrest of respondent on *any* charge—whether for distributing obscene materials or for distributing narcotics—would have had that effect. Clearly, however, respondent would have enjoyed no immunity from arrest or prosecution for the latter crime due simply to the nature of his employment. See *Branzberg* v. *Hayes*, 408 U.S. 665, 682-683, 691-692 (1972). Hence, unless the First and Fourth Amendments arbitrarily forbid warrantless arrests of the store's only employee in such circumstances, the ruling below therefore cannot be justified because of the incidental effect that arrest had in this case upon First Amendment interests.[9]

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[9] In fact, because respondent may only have been a clerk, rather than the proprietor of the store, it is dubious whether he may invoke whatever First Amendment interest a proprietor may have in keeping the store open, because respondent's sole interest in this respect would be economic, not communicative. Otherwise, *any* arrest of *any* suspect for *any* crime would give rise to a First Amendment claim, because any arrest limits a person's opportunity to engage in activities protected by the First Amendment, at least for the duration of the period that he is in custody. Furthermore, a variety of other crimes such as conspiracy, obstruction of justice, or threats against federal officials, such as the President, may implicate speech or associational rights that are protected by the First Amendment. See, *e.g.*, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Watts* v. *United States*, 394 U.S. 705 (1969). This Court has never suggested, however,

The rule adopted by the Court of Special Appeals is also overbroad in another respect. Presumably, the court intended that its rule would apply to every warrantless arrest for the distribution of obscene materials. If so, that rule would forbid warrantless arrests in circumstances in which there is no realistic possibility that an arrest could amount to a prior restraint, such as where a person is arrested after closing the store and while he is on his way home. In ~~that~~ case, however, the concerns that prompted this Court to create a special exception to the Fourth Amendment rule governing the warrantless seizure of items are wholly absent. The Court of Special Appeals' extension of that rule to the case of warrantless arrests thus unjustifiably limits a police officer's recognized authority promptly to apprehend a suspect for the commission of a crime, provided that no search of a private area is necessary to effect the arrest.

To be sure, there is some force to the argument that, because the definition of obscenity is sometimes difficult to apply, a neutral and detached magistrate, rather than a law enforcement officer, should decide whether there is probable cause to arrest a person for the distribution of a particular, allegedly-obscene book or film. But that does not appear to be the primary objection to this practice; nor was it the chief reason that this Court gave for creating an exception to the normal rule permitting a warrantless seizure of items that a law enforcement officer has probable cause to believe constitute contraband or evidence of a crime, which was that the seizure amounts to an unlawful prior restraint (see *Roaden* v. *Kentucky*, 413 U.S. at 504). A warrantless arrest will not have

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that the First Amendment imposes any limitation upon a law enforcement officer's arrest powers simply because the crime under investigation may have a communicative aspect to it.

that effect except in the situation in which, fortuitously, the suspect happens to be the only employee in the store. And even in that case, because a warrantless arrest must be followed by a hearing at which a magistrate will determine whether the arrest was supported by probable cause (see *Gerstein* v. *Pugh*, 420 U.S. 103 (1975)), a police officer's determination that a particular book or film is obscene will be promptly reviewed by a court. On balance, therefore, we submit that neither the Fourth nor the First Amendment forbids the warrantless arrest of a suspect for the distribution of obscene materials.

II. RESPONDENT'S RETRIAL PRESENTS NO DOUBLE JEOPARDY PROBLEM IF THE EVIDENCE AGAINST HIM CAN BE DEEMED INSUFFICIENT ONLY AFTER DISCOUNTING PORTIONS OF THE STATE'S EVIDENCE

1. The final issue presented by the petition is whether the Double Jeopardy Clause forbids a retrial when an appellate court concludes that certain items of evidence were unlawfully admitted at trial, and the remaining evidence is insufficient to support the verdict. Because of the manifest error of the court below on the suppression issue, there should be no occasion to reach that issue here. But even if the Court were to affirm the ruling below suppressing the magazines, this case would still be an inappropriate vehicle for the Court to decide this important and recurring issue of double jeopardy law, because the issue is of only academic interest to the parties to this case.

Respondent was charged with the distribution of obscene materials, and it appears to be legally impossible for the State to prove that charge without introducing into evidence the magazines themselves. As the petitioner in this Court, the State must dem-

onstrate that a ruling in its favor on the double jeopardy issue will provide it with some form of relief. But if the lower court's suppression ruling is sustained, both the magazines themselves and, presumably, the detectives' observations of what the magazines contained must be excluded. The State has not suggested any way in which it could proceed with a retrial in those circumstances even if it were permitted to do so by securing a ruling in its favor on the double jeopardy issue, nor has it suggested that it has any intention to reprosecute. Hence, because a favorable ruling from this Court on the double jeopardy question coupled with an unfavorable ruling on the First and Fourth Amendment questions in the petition will afford the State no relief, the State is seeking little more than an advisory opinion from this Court regarding the conduct of future prosecutions. Cf. *Allen* v. *Wright*, No. 81-757 (July 3, 1984), slip op. 12-13. Accordingly, we do not believe that there is any reason for the Court to resolve this question even if the Court were to affirm the suppression ruling of the court below.

2. Should the Court reach the issue, however, we think it clear that the Double Jeopardy Clause does not bar a retrial where an appellate court reverses a conviction on the ground that the trial court erroneously admitted certain evidence, even where that evidence is crucial to proof of the government's case.

Burks v. *United States*, 437 U.S. 1, 16-18 (1978), held that a judgment of acquittal entered by an appellate court on the ground that the totality of the evidence is insufficient to support the verdict, unless overturned on further review, is entitled to the same preclusive effect under the Double Jeopardy Clause as a jury (or trial court) verdict of acquittal. However, the companion case of *Greene* v. *Massey*, 437 U.S. 19, 26 n.9 (1978), expressly left open the question

whether the clause would also bar a retrial following a reversal of a conviction where some of the prosecution's evidence is found to have been erroneously admitted and the remaining, legally competent evidence was insufficient to support the conviction. Since *Greene* v. *Massey* was decided, every federal court of appeals to consider the question has held that such a circumstance does not erect a bar to retrial. See *United States* v. *Tranowski*, 702 F.2d 668 (7th Cir. 1983), cert. denied, No. 83-5063 (July 5, 1984); *United States* v. *Chesher*, 678 F.2d 1353, 1357-1359, 1364 (9th Cir. 1982); *United States* v. *Sarmiento-Perez*, 667 F.2d 1239, 1240 (5th Cir.) (per curiam), cert. denied, 459 U.S. 834 (1982); *United States* v. *Harmon*, 632 F.2d 812, 814 (9th Cir. 1980); *United States* v. *Mandel*, 591 F.2d 1347, 1371-1374, vacated en banc on other grounds, 602 F.2d 653 (4th Cir. 1979), cert. denied, 445 U.S. 961 (1980); accord, *State* v. *Longstreet*, 619 S.W.2d 97, 100-101 (Tenn. 1981). We submit that the appellate decisions upholding the government's right to retry a defendant where a crucial part of the evidence is subsequently held to have been erroneously admitted, leaving the remainder of the evidence insufficient to support a conviction, were correctly decided.

This Court's decisions do not support the ruling of the Court of Special Appeals. As the Court has often made clear, the Double Jeopardy Clause provides a defendant with three protections: it shields him from having to undergo reprosecution despite the existence of a final judgment of conviction or acquittal for the same offense, from having a first trial improvidently terminated prior to receipt of the verdict, and from being subjected to multiple punishments for the same offense. See, *e.g.*, *Richardson* v. *United States*, No. 82-2113 (June 29, 1984), slip op. 6-7; *Justices*

of Boston Municipal Court v. *Lydon*, No. 82-1479 (Apr. 18, 1984), slip op. 11 & n.6; *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). The only one of these protections that is relevant to this case is the right not to be retried for an offense of which the defendant has previously been acquitted. But respondent has not been acquitted, and nothing in the decision of the Court of Special Appeals even remotely suggests that he was in fact not guilty. In addition, the Double Jeopardy Clause does not entitle a defendant to demand that a judgment of acquittal be entered at any particular point in the criminal process. See *Richardson* v. *United States*, slip op. 6-9; *Justices of Boston Municipal Court* v. *Lydon*, slip op. 12-14. This Court's decisions thus provide no support for the proposition that a retrial is barred simply because the evidence that the appellate court finds to have been properly admitted is insufficient by itself to support the conviction.

Nor do the values underlying the Double Jeopardy Clause support that result. A finding of residual insufficiency under those circumstances is not tantamount to a judgment of acquittal, but is simply a description of the effect of the finding of trial error. As the Court explained in *Burks*, reversal based on trial error represents merely "a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect," such as the "incorrect receipt or rejection of evidence * * * [;] it implies nothing with respect to the guilt or innocence of the defendant" (437 U.S. at 15). Moreover, *Burks* acknowledged that the reasons why retrial has long been permitted where reversal is due simply to trial error are compelling (437 U.S. at 15, quoting *United States* v. *Tateo*, 377 U.S. 463, 466 (1964)):

> "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction."

See also *Palko* v. *Connecticut*, 302 U.S. 319, 328 (1937).

As Justice Brennan stated in his dissent in *Richardson* v. *United States*, slip op. 5 (emphasis added), "[t]he fundamental principle underlying *Burks*, and indeed most of our double jeopardy cases, is that the prosecution is entitled to one, and only one, *full and fair opportunity* to convict the defendant." Where the totality of the government's evidence is found to be insufficient, as was the case in *Burks*, the government has had its one "full and fair opportunity" to convict those who have violated its laws (*ibid.*; see also *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978)), and it is rightly denied another. Where, however, evidence held to be admissible at trial is later deemed inadmissible, it is neither overreaching nor oppressive to allow the government an opportunity to proceed again, this time under correct rules of law.

If a trial court grants, rather than erroneously denies, a suppression motion or sustains any other objection to the introduction of evidence upon which the government intends to rely to prove an essential element of its case, the prosecution has timely notice of the need to supplement its case and remedy the evidentiary defects. Where, however, the government is misled as to the need to adduce substitute or additional evidence because the error is not uncovered until appeal, the evidence actually introduced by the government "does not necessarily reflect all other available evidence of the defendant's involvement. It is impossible to know what additional evidence the government might have produced had the faulty evi-

dence been excluded at trial, or what theory the government might have pursued had the evidence before the jury been different." *United States* v. *Harmon*, 632 F.2d at 814; see *United States* v. *Sarmiento-Perez*, 667 F.2d at 1240. To deny the government the right to retry the defendant would place the government at its peril in relying on trial court evidentiary decisions and would jeopardize the retrial of numerous defendants whose guilt may not be in doubt but whose convictions have been reversed for erroneous admissions of evidence.

The courts of appeals have recognized that substantial policy considerations militate against barring retrials in these circumstances. As the Seventh Circuit observed in *United States* v. *Tranowski*, 702 F.2d at 671:

> A contrary conclusion would lead the government to "overtry" its cases—to introduce redundant evidence of the defendant's guilt—in order to insure itself against the risk of not being able to retry the defendant should some of its evidence be held on appeal to be inadmissible. It would also require the court of appeals, in every case where it reversed a conviction because of erroneous admission of evidence, to determine the sufficiency of the remaining evidence—something the court would otherwise be required to do only if the government argued harmless error.[10]

[10] Some courts have held, after *Burks*, that the reviewing court is required to decide whether the totality of the evidence was sufficient even where there might be other grounds for reversal that would not preclude retrial. See *United States* v. *United States Gypsum Co.*, 60[illegible] F.2d 414, 416 (3d Cir.), cert. denied, 444 U.S. 884 (1979); *United States* v. *Till*, 609 F.2d 228, 229 (5th Cir.), cert. denied, 445 U.S. 955 (1980); *United States* v. *Meneses-Davila*, 580 F.2d 888, 896 (5th Cir. 1978); *United States* v. *Orrico*, 599 F.2d 113, 116 (6th Cir. 1979); *United States* v. *Watson*, 623 F.2d 1198, 1200 (7th Cir. 1980); *United States* v. *Vargas*, 583 F.2d 380, 383 (7th Cir. 1978); *United States* v. *McManaman*, 606 F.2d 919, 927 (10th Cir. 1979). Whether or not such determinations are required as a matter of law, it is clear that to expand the bar against retrial to cases involving the erroneous admission of evidence (where the totality of the evidence establishes the defendant's guilt) would vastly increase the frequency and complexity of appellate evaluations of evidentiary sufficiency.

And the Ninth Circuit has pointed out that barring retrials in these circumstances would injure the rights of defendants as well as the government (*United States* v. *Harmon*, 632 F.2d at 814, quoting *United States* v. *Tateo*, 377 U.S. at 466):

> "[I]t is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interests."

In this case, of course, reprosecution seems entirely impractical, and perhaps legally impossible, without the suppressed evidence (see pages 21-22, *supra*). But often that will not be true, and any general rule should not be based upon the unique obstacles to retrial that happen to exist here. Nor is it appropriate to create a narrower rule that precludes retrial whenever the appellate court is unable to discern how the prosecution could replace the improperly admitted evidence. An appellate court must base its decision on the record before it, and the record does not normally disclose all of the evidence that the government may have had at hand but elected, for one reason or another, not to offer into evidence. To enter a judgment of acquittal in these circum-

stances would require an appellate court to speculate whether the government has additional evidence that would support a prosecution. And, from a practical standpoint, declining to enter a judgment of acquittal also would not significantly threaten defendants with unjustified retrials, because it is highly unlikely that the government would seek a retrial where an appellate court has excluded evidence that is both crucial to its case and irreplaceable. Accordingly, were the Court to reach this issue, we submit that the Double Jeopardy Clause should not be construed to bar a retrial where an appellate court finds that certain items of evidence, essential to the prosecution's case as it was presented at the first trial, were improperly admitted.[11].

CONCLUSION

The judgment of the Maryland Court of Special Appeals should be reversed.

Respectfully submitted.

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MARCH 1985

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[11] Were the Court to adopt such an exception, however, it should be limited to cases in which the evidence found to have been erroneously admitted *both* (a) is an essential and unique item of proof *and* (b) is inadmissible on any other basis (or with a different foundation).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10183

No. 84-778

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF MARYLAND,

Petitioner,

v.

BAXTER MACON,

Respondent.

On Writ Of Certiorari To The Court Of Special Appeals Of Maryland

---

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Do the principles enunciated in *Roaden* v. *Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973) and *Heller* v. *New York*, 413 U.S. 486, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973) immunize alleged violators from criminal liability for any conduct or activity occurring prior to a judicial determination of the fact of obscenity?

2. Is an undercover police officer who made a determination that certain magazines purchased by another officer were obscene, precluded under the principles enunciated in *Roaden* v. *Kentucky* and *Heller* v. *New York* from making a warrantless arrest and a warrantless seizure constructive or otherwise, and is the exclusionary rule applicable to the use of material acquired as evidence?

3. Whether the holding of the Appellate Court that the material taken from the Silver News Book Store should have been excluded from the Respondent's trial, and without the same there would have been insufficient evidence to convict, is sufficient to justify reversal of the conviction and dismissal of the charging document?

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BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Court of Special Appeals of Maryland in *Macon* v. *State*, is reported at 57 Md. App. 705, 471 A.2d 1090, *cert. denied*, *State* v. *Macon*, 300 Md. 795, 481, A.2d 240 (1984).

STATEMENT OF THE CASE

During the months of April and May, 1981, the Prince George's County Vice-Criminal Intelligence Section were investigating whether there were obscene magazines within the adult book stores in Prince George's County

(M3-85).[1] This investigation and the group of officers involved was headed up by Sergeant Alan A. MacDonald (M3-84), who established the procedure that would be used by other officers conducting the investigation (M3-85). The officers were instructed to go into the book store and look for magazines that basically on its "cover showed sexual acts that may *be distasteful to them*". (M-386, M3-102)

The investigation continued until approximately May of 1981 and resulted in approximately forty arrests and raids, eighteen of which included employees of Silver News, an adult book store located in Prince George's County, and there were occasions when the same employee was arrested more than once. A large number of the arrests were made without warrants or prior judicial scrutiny by a neutral and detached magistrate having the opportunity to "focus searchingly on the issue of obscenity." At no time did a neutral and detached judicial officer view the material prior to the arrests or thereafter.

On May 6, 1981, Detective Ray Evans, following the instructions of Sergeant MacDonald, entered the Silver News Adult Book Store located at 2488 Chillum Road. He was there to look or search for magazines that on their cover showed sexual acts that were distasteful to him. He was then to take them outside to Detective Sweitzer, after paying for them with a $50.00 dollar bill. The plan was that Detective Sweitzer, following the instructions of Sergeant MacDonald, would determine if the magazine selected by Evans was obscene and then Detective

[1] These transcript page references were not included in the Joint Appendix, but can be found in the Reporter's Official Transcript of Proceedings (Motions), volume III (M-3) in the Circuit Court for Prince George's County, Maryland appearing at R. 124.

Sweitzer, who had in his possession, a "statement of charges," would arrest the cashier for "distribution of obscene material." The plan was further to take back the $50.00 dollar bill originally given to the cashier as evidence to be used at the trial, and retain possession of the magazines.

This is exactly what happened on May 6, 1981, to Baxter Macon, one of the clerks in the store. *Detective Sweitzer* went into the store after he had determined that the magazines selected by Detective Evans were obscene and *Detective Sweitzer arrested the clerk* without a warrant and took back the $50.00 dollar bill, keeping the change Detective Evans had received. Customers were requested to leave and the store was closed and the clerk was taken to the police headquarters for processing. At the time Detective Sweitzer arrested the Respondent, a search without a warrant was conducted for the $50.00 bill. It was eventually found in the bottom of the cash register. At this point, the magazines were unlawfully in the possession of Detective Sweitzer as he kept them without due process of law and without payment therefore. This unlawful retention or seizure took place when the money was confiscated and the change was not returned.

SUMMARY OF ARGUMENT

1. The principles enunciated in *Roaden* v. *Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973) and *Heller* v. *New York*, 413 U.S. 486, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973) read in parimateria immunize alleged violators from criminal liability for any conduct or activity occurring prior to a judicial determination of the fact of obscenity by a neutral and detached magistrate who has had an opportunity to "focus searchingly on the issue of

obscenity". The necessity for judicial scrutiny in the form of an ex-parte determination of probable cause on the obscenity issue is to temporarily erode or evaporate the "presumption of protected expression" and "protected setting" under the First Amendment recognized in *Roaden* and *Heller, supra*, and until such a procedure or process is completed, the conduct or activity of an alleged violator is not subject to criminal liability and the first step in the criminal prosecution cannot constitutionally begin because of the special constraints of the First and Fourteenth Amendments. The conduct of the alleged violator must be judged in light of the legal status of the material at the time he is said to distribute the same, not at some later date.

2. An undercover police officer may not make a warrantless arrest or seizure without a warrant on the basis that there was a distribution of obscene material to another undercover police officer in a business open to the public, under circumstances where he substitutes his judgment as to the obscenity of the material for that of a neutral and detached magistrate. Until there is prior judicial scrutiny and a probable cause determination of obscenity, there is no probable cause that a crime is committed in the officer's presence to justify a constitutional arrest or seizure without a warrant of presumptively protected material or the distributor of the same. The police are not free to adopt whatever procedure they desire in attempting to regulate the alleged distribution of obscene material. The procedure accepted and recognized in *Roaden* v. *Kentucky* and *Heller* v. *New York*, *supra*, must be adhered to in order to avoid interference with First Amendment, Fourth Amendment, Fifth Amendment and Fourteenth Amendment rights. The exclusionary rule is applicable to the fruits of unlawful and unconstitutional police conduct.

3. Under *Burks* v. *United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), an Appellate Court is authorized to "go beyond relief sought" in order to provide that relief which would be "just under the circumstances" where an Appellate Court is of the opinion that evidence unlawfully and unconstitutionally acquired should have been excluded from the trial; the court is justified in reversing the conviction on the realistic basis that on retrial there would be insufficient evidence to convict. Dismissal of the charging document in light of the exclusion of evidence is also "just under the circumstances", for to retry the obscenity issue without the material in light of the guidelines that the trier of fact must follow under *Miller* v. *California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), would be a re-trial in futility and certainly not in the best interest of judicial economy. To begin the re-trial with instructions to exclude the evidence would result in the same relief which the Appellate Court granted.

ARGUMENT I

THE PRINCIPLES ENUNCIATED IN *ROADEN* V. *KENTUCKY* AND *HELLER* V. *NEW YORK* IMMUNIZE ALLEGED VIOLATORS FROM CRIMINAL LIABILITY FOR ANY CONDUCT OR ACTIVITY OCCURRING PRIOR TO A JUDICIAL DETERMINATION OF THE FACT OF OBSCENITY BY A NEUTRAL AND DETACHED JUDICIAL OFFICER WHO HAS HAD AN OPPORTUNITY TO "FOCUS SEARCHINGLY ON THE ISSUE OF OBSCENITY."

"The setting of the bookstore or the commercial theatre are each presumptively under the protection of the First Amendment". Further, the material distributed or exhibited therein is considered to be a presumptively legitimate distribution or exhibition under the protection of the First Amendment. *Roaden* v. *Kentucky supra*.

Because of this constitutional presumption under the First Amendment, an alleged violator's conduct or activity must be judged in light of the legal status of the material he distributes or exhibits at the time the distribution takes place, and not at some later date, to subject him to criminal liability, as the constitutional presumption immunizes him until the presumption of a legitimate distribution is evaporated or eroded. Until such time, the constitutional presumption continues in effect.

The procedure for temporarily evaporating or eroding the presumption of a legitimate distribution under the First Amendment was enunciated in *Roaden*, *supra*, and *Heller* v. *New York*, *supra*. That procedure requires a neutral and detached judicial officer to make a probable cause determination the material is obscene, having an opportunity to "focus searchingly on the issue of obscenity". Once this occurs, the presumption is temporarily evaporated or lifted and at some subsequent time the alleged violator's conduct is and can be judged in a different light, for the *legal status* of the material he distributes or exhibits has temporarily changed, although in content or character, it remains the same. The constitutional presumption is judicially evaporated in order that the first step in the prosecution of an alleged violator may consitutionally begin. The presumption as to the material and the setting once again becomes viable at the time of trial and continues "until at least five members of this court have declared the material obscene." *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d. 446 (1973).

Because ". . . [T]he line between speech unconditionally guaranteed and speech which may be legitimately regulated, suppressed or punished is finely drawn . . .

The separation of legitimate from illegitimate speech calls for . . . "sensitive tools", which are necessary to break down this barrier or wall between the prosecution and alleged violator, created by this heavy constitutional presumption under the First Amendment.

For these reasons under the facts and circumstances in this case, the prosecution of the Respondent should never have begun; and the action of the Court of Special Appeals should be affirmed. If the conduct of the Respondent is to be judged in light of the legal status of the material he allegedly distributed on May 6, 1981, at a time prior to any judicial erosion or evaporation of the constitutional presumption in favor of the material, and the setting in which it was distributed, the Respondent is immune from criminal responsibility under the principles enunciated in *Roaden* and *Heller*, *supra*.

ARGUMENT II

AN UNDERCOVER POLICE OFFICER WHO MADE AN AD HOC DETERMINATION THAT TWO MAGAZINES PURCHASED BY ANOTHER OFFICER WERE OBSCENE IS PRECLUDED UNDER THE PRINCIPLES ENUNCIATED IN *HELLER* V. *NEW YORK*, 413 U.S. 486, 93 S.CT. 2789, 37 L.ED.2D 745 (1973) AND *ROADEN* V. *KENTUCKY*, 413 U.S. 496, 93 S.CT. 2796, 37 L.ED.2D 757 (1973), FROM MAKING A WARRANTLESS ARREST OF THE DISTRIBUTOR AND A WARRANTLESS SEIZURE CONSTRUCTIVE OR OTHERWISE; AND THE EVIDENCE ACQUIRED SHOULD BE EXCLUDED FROM USE AT A TRIAL UNDER THE FOURTH AND FIFTH AMENDMENTS.

The factual situation in the matter before this Honorable Court is similar if not almost identical to the facts considered by the Court in *Roaden* v. *Kentucky*, supra. It is uncontested that (a) Detective Sweitzer had no warrant when he arrested the Respondent for the distribution of obscene magazines, to another police officer, Detective

Evans, (b) that there had been no prior determination by a judicial officer on the question of obscenity, and (c) that the arrest was based solely on Detective Sweitzer's personal conclusion the magazines were obscene.

The variance from the facts in *Roaden, supra,* is in the Petitioner's claim that the selection of the magazines by Detective Evans and payment for the same, with confiscation of the money paid after arresting the Respondent, was not a *search* and seizure, as the material was lawfully acquired prior to any illegality. But for this difference, the uncontested facts in this matter would be similar to those in *Roaden, supra.* For in *Roaden,* it was uncontested that there was a seizure without a warrant.

A search, to which the exclusionary rule may apply has been described as one in which "there is a quest for, a looking for, or a seeking out of that which is offered against the law, by enforcement personnel." *Vargas* v. *State of Texas,* Court of Criminal Appeals, 542 S.W. 2d 151, 153. In *Lustig* v. *United States,* 338 U.S. 74, 69 S.Ct. 1372, 93 L.Ed. 819, (1949), Justice Frankfurter described a "search" in these terms: [s]earch is a functional, not merely a physical, process. Search is not completed until effective appropriation, as part of an uninterrupted transaction is made of illicitly obtained objects for subsequent proof of an offense. 338 U.S. at 78, 69 S.Ct. at 1374.

Detective Evans was under instructions from Sergeant MacDonald to go into the book store and look for magazines that basically on its "cover showed sexual acts that may be distasteful to him." (Detective Evans) (M3-86) (M3-102) He was then instructed to take them to Detective Sweitzer waiting outside who was to inspect the contents and determine if they were obscene, and if so, *Detective Sweitzer was to arrest* the Respondent. This is the procedure that was developed by Sergeant MacDonald to be followed by Detective Evans and Detective Sweitzer (M3-84, 85, 86).

These facts demonstrate official conduct consisting of a joint venture to circumvent a court-decreed procedure for the separation of legitimate from illegitimate speech that "demands a greater adherence to the Fourth Amendment warrant requirement," than the process for the seizure of "contraband or stolen goods, or objects dangerous in themselves." *Roaden* v. *Kentucky, supra,* 413 U.S. at 502, 93 S.Ct. at 2800.

Respondent recognizes that "implications of a search are inherent in any quest for evidence by the police, and, does not suggest that every instance of such a seeking is a search." The conduct of Detective Evans has to be scrutinized in light of the circumstances surrounding his instructions by Sergeant MacDonald to determine whether his conduct and that of Detective Sweitzer are covered by the constitutional provisions regulating search and seizure in light of the First and Fourteenth Amendments. Detective Evans was instructed to look for magazines that "on its cover showed sexual acts" that may be distasteful to him. It was also pre-determined that the money paid for the magazines would be taken back at the time of the arrest without a warrant and the magazines impounded as evidence of the illegal distribution to Detective Evans. The money is not necessary as an *element of evidence* for the crime of distribution under Article 27, Annotated Code of Maryland, 1982 replacement volume. Section 417, (3) defines distribute as follows: "distribute," *means to transfer possession of, whether with or without consideration.* The confiscation of the money as evidence alleged by the Petitioner makes clear the intent was never to allow the Respondent to keep payment for the material distributed. This conduct, Petitioner argues, is a taking of

property with due process of law and not a seizure that invokes the Fourth Amendment guaranties. There are no facts in the instant matter that realistically suggest "a now or never situation." To the contrary, there was ample time for the detectives to take the magazines to a magistrate and secure an arrest warrant and a search and seizure warrant. See page 24, Petitioner's Brief. The officers could have decided to take their information to a Commissioner and seek an arrest warrant for the clerk. *The seizure of the magazine in this case took place when the arresting officer, who had come into possession of the magazines from Detective Evans, arrested the Respondent and confiscated the money in addition to retaining the magazines.* Possession in this fashion is not the mode or method by which any ordinary paying customer acquires property from a store open to the public. To the contrary, this is a taking of property "without due process of law," a seizure. Therefore, the uncontested fact of a seizure without a warrant present in *Roaden, supra,* appears in the instant case by circumstance of logic. Petitioner attempts to evade this fact under the Ruberic the magazines were purchased rather than unconstitutionally seized, because in the first instant, payment was made to the Respondent.

A complete review of the testimony makes clear that every aspect of the investigation in search of obscene material was prearranged, including the re-possession of the money given in "payment" for the evidence. Yet, an element essential to the validity of the search and unlawful retention of the magazines, judicial concurrence regarding the obscene nature of the evidence was absent; and the failure to seek a judge's opinion on the obscenity of the magazines could not have been inadvertent, for in this case, the decision not to seek a judge's opinion had already been pre-determined before the warrantless arrest. The inescapable conclusion here is that the procedure adopted

was designed in part to evade that phase of the warrant procedure whose specific purpose is the protection of the First Amendment freedoms. *Roaden* and *Heller, supra.*

The alleged purchase in many instances of the investigation, as part of a single planned transaction, was immediately followed by a warrantless arrest and the seizure of the money given in exchange for the allegedly obscene matter, and the Respondent's situation fell into this category. Such a transaction cannot be considered a purchase considering the parties involved. There was no intent to part with the money as in an ordinary sale, and the appropriation of the alleged obscene magazines and money was tantamount to a warrantless seizure. *State* v. *Furuyama*, 637, P.2d 1095 at 1011.

First Amendment considerations militate against the approval of transactions expressly designed to evade specific warrant requirements governing the seizure of material arguably subject to constitutional protection. The submission of material patently obscene in the opinion of the police officer, for judicial examination may not have served a purpose, but it still was incumbent upon them to do so. *Roaden, supra,* for as this Court so aptly put it:

> "the point of the Fourth Amendment, which is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. It's protection consists in reqiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competetive enterprise of ferreting out crime. *Johnson* v. *U.S.*, 333 U.S. 10, 13-14, 68 S.Ct. 367, 368-369, 92 L.Ed. 436 (1948).

"Closing the courtroom door to evidence . . . (flowing from) official lawlessness" is the customary remedy for violations of Fourth Amendment Rights, *United States* v.

Crews, 445 U.S. at 474, 100 S.Ct. at 1251 (1979) and the public interest would be better served by suppressing the evidence obtained as a consequence of the unlawful arrests. For the exclusionary "rule" is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U.S. 206, 217, 80 S.Ct. 1437, 1444, 4 L.Ed.2d. 1969 (1960). Suppression and exclusion of illegally *retained* evidence consisting of allegedly obscene magazines is "the only effective sanction for infringements of First and Fourth Amendment freedoms". *Roaden, supra*. Suppression is necessary "to vindicate the public's right of access to information and expressive material arguably protected by the First Amendment." Whether the material unlawfully *retained* is one, several or large quantities of magazines. The remedy is designed to dissipate a possible "chilling effect" on free speech.

The Fourth Amendment violations occurring in the case before this Honorable Court involve the unreasonable seizure of the person and his property. This Court has maintained that a warrant for the seizure of expressive material should "not be issued solely on the conclusionary opinion of a police officer that the material is obscene." *Roaden, supra*, 413 U.S. at 506, 93 S.Ct. at 2802. A logical corollary to this holding is that a police officer may not effect a warrantless arrest in a setting where First Amendment freedoms are implicated. A warrantless arrest in any situation is justified only if there is probable cause to believe an offense has been or is being committed. A similar showing of such probability is a pre-requisite to the issuance of a warrant authorizing a search and seizure. But just as an officer's conclusiory opinion that arguably protected material is obscene does not give rise

to probable cause supporting the issuance of a warrant authorizing its seizure, such opinion cannot sustain the warrantless arrest of its putative promoter. *Roaden* v. *Kentucky, supra*, 413 U.S. at 504-506, 93 S.Ct. at 2801-2802. *Marcus* v. *Search Warrant*, 367 U.S. at 731-32, 81 S.Ct. at 1715-1716. The arrest of the Respondent cannot be upheld under the Fourth Amendment as it was premised on the ad hoc obscenity determination of police officers, nor can the retention of evidence be justified. *Roaden* v. *Kentucky, supra*, 413 U.S. at 504-506, 93 S.Ct. at 2801-2802.

It would appear that this case is to be controlled by *Roaden* v. *Kentucky, supra*. It would seem that Roaden clearly holds a police officer may not arrest, search or seize without a warrant on a charge of distributing obscene material in a place of public accommodation such as a bookstore where he substitutes his judgment as to the obscenity of the material for that of a neutral and detached magistrate. The exceptions under which an arrest and seizure of "contraband or stolen goods or objects dangerous in themselves" *Coolidge* v. *New Hampshire*, 408 U.S. 443, 472, 91 S.Ct. 222, 29 L.Ed.2d 564 (1971) are, as stated in *Roaden*, 413 U.S. at 502, 93 S.Ct. at p.2800" to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizure under Fourth and Fifth Amendment standards." No such exigent circumstance as contended by the Petitioner's appear here. The clear purport of this decision is that the sometimes sophisticated value judgments necessary to establish guilt or innocence under obscenity laws must, to preserve First Amendment rights, be passed upon by a judicial officer rather than a member of the police department. To the same effect, see *Lee Art Theatre* v. *Virginia*, 392 U.S. 636, 88 S.Ct. 2103, 20 L.Ed.2d, 1313 (1968) and *Marcus* v. *War-*

rant, 367 U.S. 717, 91 S.Ct. 1708, 6 L.Ed.2d 1117 (1968). Nothing in the aforementioned authorities in any way limit law enforcement officers from seizing persons or alleged obscene materials through the use of warrants properly prepared, issued and executed. *Roaden* and *Heller, supra.*

Seventy five years ago, in *Boyd* v. *United States*, 116 U.S. 616, 630 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886) considering the Fourth and Fifth Amendments running almost into each other, on facts before it, this Court held that the doctrines of those Amendments:

> "Apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers that constitute the essence of the offense, but it is the invasion of his indefeasible right of personal security, personal liability and private property . . . Breaking into a house and opening boxes and drawers are circumstance of aggravation; but any forcible and compulsory extortion of a man's own testimony or his private papers to be used as evidence to conviction of a crime or to forfeit his goods, is within the condemnation . . . (of those Amendments)".

The Court noted that "Constitutional provisions for security of persons and property should be liberally construed . . . It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments therein," 116 U.S. at 635, 6 S.Ct. at 535.

The warrantless arrest of the Respondent, the confiscation and impoundment of the magazines and the change from the Fifty Dollar Bill, are within the condemnation of the Fourth and Fifth Amendments.

This Court had the opportunity in the case of *Lo-Ji Sales, Inc.* v. *State of New York*, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1978) to comment on the argument "that by virtue of the Petitioner's display of the items to the general public in areas of its store open to them, Petitioner had no legitimate expectation of privacy against governmental intrusion." Respondent in *Lo-Ji Sales, supra*, relied on *Rakas* v. *Illinois*, 435 U.S. 922, 98 S.Ct. 1483, 55 L.Ed.2d 515 (1978) suggesting that no warrant was needed for the *search* and seizure of materials allegedly obscene.

To this, the Court responded "there is no basis for the notion that because a retail store invites the public to enter, it consents to wholesale *searches* and seizures that do not conform to Fourth Amendment guarantees."

In *Lo-Ji, supra*, an investigator for the New York State Police purchased two reels of film. Upon viewing them, he concluded they were obscene. He took them to a town justice who viewed the films in their entirety, and based on an affidavit of the investigator, a warrant was issued authorizing the *search* of the store and seizure of other copies of the two films viewed by the town justice. The only thing to be seized were copies of the two films purchased by the officer. Before going to the store, the town justice also signed a *warrant* for the arrest of the clerk who sold the two films. The store clerk was immediately placed under arrest and advised of the "search warrant." The search began in an area of the store which contained booths in which silent films were shown in coin operated projectors. The search party then moved to an area in which books and magazines were on display. The town justice reviewed the magazines, spending less than ten seconds, and no more than a minute, looking through each

one. When he was satisfied that probable cause existed, he immediately ordered the copy he had reviewed, along with copies of the same or "similar" magazines seized. The original search and seizure warrant only authorized the *search for and seizure* of copies of the two magazines purchased by the police officer and listed on the warrant. The additional *search* and *seizure*, once on the premises, of "similar items" of those viewed by the magistrate was without a warrant. The items *searched for and seized* were later listed on the warrant, after the seizure and *impoundment* of the material.

The search in *Lo-Ji, supra*, began when the local justice and his party entered the store. But at that time, there was not sufficient probable cause to pursue a *search* beyond looking for additional copies of the two films specified in the warrant that had been *viewed* by the town justice prior to going to the store. This Court commented in *Lo-Ji, supra*, as to the "validity of *searching* even for those," in addition to the fact that "nor can it reasonably be argued that the search was incident to arrest of the store clerk." *Chimel* v. *California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

This Court in *Lo-Ji, supra*, pointed out "we have repeatedly said that a warrant authorized by a neutral and detached officer is a more reliable safe guard against improper *searches* (emphasis applied) than a hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting-out-crime,' " *Johnson* v. *United States, supra* at 14, *United States* v. *Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). See also *Coolidge* v. *New Hampshire, supra, at 450.*

In addition, the Respondent was made aware by this Court's opinion in Lo-Ji, supra, that "of course contraband may be seized without a warrant under the plain view doctrine, but this Court has recognized special constraints upon *searches* and seizures of material arguably protected by the First Amendment, e.g., *Heller* v. *New York, supra; Marcus* v. *Search Warrant, supra.*

This Honorable Court rejected the state's contention in *Lo-Ji, supra*, that it acted in compliance with *Heller* v. *New York, supra*, and further recognized that when the justice instructed the police to seize "similar items" he left the determination of what was "similar" to the officer's discretion, a determination that the officers are precluded from making under the First Amendment.

This Court's observation in *Lo-Ji, supra*, that "the town justice viewed the films not as a customer, but without the payment a member of the public would be required to make" and "similarly, in examining the books, he was not seeing them as a customer would ordinarily see them," is applicable to the factual situation herein. For when Detective Evans entered the book store and examined certain magazines that he felt would be distasteful to him he was not seeing them as a customer would ordinarily see them. He was searching or looking for obscene material without a warrant. Nor was he viewing the magazines as a customer who would intend to pay for them and allow the proprietor to keep the money paid for the magazines as he had pre-determined that the money would be taken back. Equally applicable to the facts in the instant matter are principles that under the First and Fourth Amendments presumptively protected material may not be impounded without a warrant. See *Roaden, supra.*

For these reasons, the conduct of Detective Evans and Detective Sweitzer are comparable to the conduct of the police officers condemned in *Lo-Ji, supra.* Our society is better able to tolerate the alleged business of p[illegible]nogra-

phy where the Respondent was employed than procedures designed by police to circumvent the First and Fourth Amendment warrant requirements designed by this Honorable Court.

For these reasons, the holding of the Court of Special Appeals is correct and should be affirmed.

ARGUMENT III

REVERSAL OF THE RESPONDENTS CONVICTION AND DISMISSAL OF THE CHARGING DOCUMENT WAS PROPER TO PROVIDE THAT RELIEF WHICH WOULD BE "JUST UNDER THE CIRCUMSTANCES".

In *Burks* v. *United States*, *supra*, this court recognized that *Forman* v. *United States*, 361 U.S. at 425, 80 S.Ct. at 486, indicated an Appellate Court is authorized by Sec. 2106 to "go beyond the particular relief sought" in order to provide that relief which would be "just under the circumstances". This then would would apply equally to the Court of Special Appeals in the instant matter.

The respondent had in the course of his prosecution sought a "judgment of acquittal on the basis that the evidence was legally insufficient and also had moved for a new trial".

In finding that the matter taken from the Silver News Bookstore should have been excluded from the Respondent's trial, the Court of Special Appeals concluded that without the material there would be insufficient evidence to convict. Since the Respondent had once been convicted, the Double Jeopardy Clause would preclude a second trial once the reviewing court has found the evidence used or to be used insufficient. No evidence at all would then constitute insufficient evidence. A realistic application then, of an Appellate Court's authority to "go beyond the relief sought in order to provide the relief

which would be just under the circumstances", to the circumstances in the present case justifies reversal and dismissal of the charging document; for to require a retrial as to the issue of obscenity, where the material alleged to be obscene is excluded from the trial is to inflict an undue financial burden on the trial court and the state judicial system. Petitioner well knows that the material admitted in the first trial is indeed indispensable to successful prosecution. The trier of fact cannot make the determination as to obscenity of the material alleged to be obscene without viewing the same in its entirety in order to apply the three-part test enumerated by this Court in *Miller* v. *California*, *supra*.

It would, therefore, seem that the only realistic application of *Burks*, *supra*, in light of the facts and circumstances in the case was taken by the Court of Special Appeals, "in order to provide that relief which would be just under the circumstances".

For these reasons, it is respectfully suggested that the holding of the Court of Special Appeals was correct under the circumstances and should be affirmed.

CONCLUSION

This Court as been consistent in holding that a police officer may not make a warrantless arrest for the distribution of obscene material under circumstances where he substitutes his judgment as to the obscenity of the material for that of a neutral and detached magistrate. He also may not make a warrantless search for or seizure of allegedly obscene material. This Court has further repeatedly said that a warrant authorized by a neutral and detached judicial officer is "a more reliable safe guard against improper *searches* (emphasis applied), then the hurried judgment of a law enforcement officer 'engaged in

the often competitive enterprise of ferreting-out-crime.' " See *Lo-Ji Sales*, v. *New York*, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1978). An aspect of the warrant procedure tailored to protect First Amendment freedoms could not have been meant for easy evasion with a modicum of ingenuity. To sanction the conduct of the police officers in the instant matter would be the nullification of this Courts-decreed "sensitive tool" to separate legitimate from illegitimate speech.

As this Court has indicated, our society is better able to tolerate the business of pornography than a return to the general warrant era. It is respectfully suggested that this is also applicable to conduct that attempts to nullify this courts-decreed procedure in connection with warrantless arrests, searches and seizures in the First Amendment area.

As indicated heretofore, the factual situation in the matter before this Honorable Court, is similar to that of *Roaden, supra*, and in particular, *Lo-Ji, supra*, for in *Lo-Ji*, the police officer was instructed by the town justice to make a search for similar obscene material without a warrant, leaving the discretion to the police officer as to what is obscene. And in the instant case, the police officer was instructed by his superior to look for and/or search for obscene material which was distasteful to him, thereby leaving the total discretion to the police officer initially to determine in his search what was obscene without any judicial concurrence in the instant matter. In the instant matter as *Roaden, supra*, the police officer was allowed to substitute his judgment as to what was obscene for that of a neutral and detached judicial officer.

For these reasons, the judgment of the Court of Special Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

United States Constitution:

Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property; without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV:

SECTION L

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Annotated Code of Maryland (1982 Repl. Vol.):

Article 27

OBSCENE MATTER

§ 417. Definitions.

As used in this subtitle,

(1) '*Matter*' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(2) '*Person*' means any individual, partnership, firm, association, corporation, or other legal entity.

(3) '*Distribute*' means to transfer possession of, whether with or without consideration.

(4) '*Knowingly*' means having knowledge of the character and content of the subject matter.

No. 84-778

IN THE

Supreme Court of the United States

October Term, 1984

STATE OF MARYLAND,

Petitioner,

v.

BAXTER MACON,

Respondent.

On Writ of Certiorari to the Court of Special Appeals of Maryland

BRIEF OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., MOTION PICTURE ASSOCIATION OF AMERICA, INC., NATIONAL ASSOCIATION OF COLLEGE STORES, INC., AND THE FREEDOM TO READ FOUNDATION, AS *AMICI CURIAE*, IN SUPPORT OF RESPONDENT

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STATEMENT

The American Booksellers Association, Inc.; the Association of American Publishers, Inc.; the Council for Periodical Distributors Associations; the International Periodical Distributors Association, Inc.; the Motion Picture Association of America, Inc.; the National Association of College Stores, Inc.; and The Freedom to Read Foundation (collectively referred to as *"Amici"*) submit this joint brief *amici curiae,* pursuant to Rule 42 of the Rules of the Supreme Court of the United States, in support of respondent. This joint brief is submitted upon the written consent of both petitioner and respondent.[1]

The *Amici*

The *amici*'s members publish, produce, distribute, sell and lend books, magazines, other printed materials of all types, and motion pictures, including those which are scholarly, literary, scientific and entertaining.

The American Booksellers Association, Inc. (ABA) is a trade association organized under the laws of the State of New York. It is the major national association of booksellers in the United States. ABA has approximately 5,200 members consisting of private book stores, department book stores, university book stores and chain book stores.

The Association of American Publishers, Inc. (AAP) is a trade association organized under the laws of the State

[1] The original of petitioner's written consent by the Attorney General of Maryland has previously been filed with this Court. The original of respondent's written consent by his counsel Burton Sandler is being filed herewith.

of New York. It is a major national association in the United States of publishers of general books, textbooks and educational materials. Its approximately three hundred and twenty-five members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of all general, educational and religious books and materials produced in the United States. These works are sold and distributed in all fifty states to schools, universities and libraries and through thousands of bookstores, department stores, drug stores, newsstands and other outlets in towns, villages and cities.

The Council for Periodical Distributors Associations is an Illinois not-for-profit corporation. It is the national trade association for over five hundred independent local wholesale distributors of magazines, comic books, paperback books and newspapers in every state of the United States.

The International Periodical Distributors Association, Inc. is a trade association organized under the laws of the State of New York. It is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The Motion Picture Association of America, Inc. (MPAA) is a trade association whose members are among the leading producers and distributors of motion pictures

in the United States. All of MPAA's member companies engage in the production and distribution of motion pictures for exhibition in motion picture theaters.

The National Association of College Stores, Inc. is a trade association composed of approximately 2,300 college stores located throughout the United States.

The Freedom to Read Foundation, a non-profit organization supported by voluntary donations, was established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions wherein every citizen's First Amendment freedoms are fulfilled; to support the right of libraries to include in their collections and make available any work which they may legally acquire; and to set legal precedent for the freedom to read on behalf of all citizens.

Interest of the *Amici*

The *amici* are all involved in some aspect of making reading material and motion pictures of all kinds available to the general public. For this reason, the *amici* have a continuing interest in the decisions of this Court involving the balancing of First Amendment rights, and restrictions on materials with sexual content, including obscene materials not protected by the First Amendment. The *amici*'s brief will indicate the impact of the legal principles involved upon those who produce, distribute, sell, exhibit and lend material which is not obscene. The *amici* have brought the same perspective to the Court in previous cases. *E.g., Brockett* v. *Spokane Arcades, Inc.,* Nos. 84-28 and 84-143, October Term, 1984; *Vance* v. *Universal Amuse-*

ment Co., 445 U.S. 308 (1980); *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319 (1979). The *amici* have learned from experience that, in an eagerness to attack the social harms perceived to stem from the prevalence and accessibility of sexually-related materials, state and city legislators and enforcement agencies frequently treat legitimate constitutionally-protected books, periodicals and motion pictures identically with those materials which are obscene and not protected. Unless the constitutionally mandated distinction is maintained, First Amendment rights may be threatened and curtailed.

ARGUMENT

THE FIRST AMENDMENT PROHIBITS THE COMMENCEMENT OF CRIMINAL CHARGES ON THE BASIS OF A POLICE OFFICER'S PERSONAL INTERPRETATION OF THE OBSCENITY LAW.

Whether the purchase of magazines in this case was a "seizure" cannot be addressed except in the context of the First Amendment, for the ultimate question before the Court is whether a police officer may be the personal arbiter of what a bookstore may sell.

In the briefs of the petitioner and Solicitor General, the nice legal issue of whether a purchase is a "seizure" under the Fourth Amendment is so inflated that it completely overshadows and distorts the critical First Amendment issue in this case. The unlawful conduct commenced when the police officers took it upon themselves, contrary to all precedent of this Court, personally to decide whether the purchased magazines were obscene. Any and all conduct

based on that unlawful determination is in violation of the First, Fourth and Fourteenth Amendments. The First and Fourteenth Amendments do not countenance the commencement of criminal obscenity charges on the basis of the "hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime." *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319, 326 (1979), quoting *Johnson* v. *United States*, 333 U.S. 10, 14 (1948). A neutral and detached magistrate must focus searchingly on the question of obscenity before materials in a setting presumptively under First Amendment protection may provide the predicate for criminal obscenity charges. *Lo-Ji Sales, Inc.* v. *New York, supra; Roaden* v. *Kentucky*, 413 U.S. 496 (1973); *Lee Art Theatre* v. *Virginia*, 392 U.S. 636 (1968); *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961).

The petitioner and the Solicitor General cite numerous cases analyzing the Fourth Amendment in factual contexts that do not implicate the First Amendment. These cases are simply inapposite. Because of the unique status given to the First Amendment in the panoply of rights granted by the United States Constitution, *e.g.*, *NAACP* v. *Button*, 371 U.S. 415 (1963), the interplay of the First and Fourth Amendments has given rise to special requirements governing state action that has the direct or indirect effect of restricting protected expression.

This Court has ruled that police officers may not seize publications or films in a setting presumptively protected under the First Amendment without a prior determination of obscenity by a neutral and detached magistrate. *Roaden* v. *Kentucky, supra*. In the case presently before this Court,

the magazines were purchased by the officers who then commenced criminal charges based only upon their personal interpretation of obscenity. The petitioner and the Solicitor General argue that the purchase was not a "seizure" under the Fourth Amendment and therefore that the First Amendment concerns animating this Court's decision in *Roaden* are irrelevant here.

Does the payment of $12.00 by the officer in this case render the First Amendment guarantees void and of no value? Certainly this Court's requirement that obscenity be determined by a magistrate cannot so easily be short-circuited.

The officers' unlawful determination of obscenity is the source of the unlawful seizure of the clerk and the constructive seizure of the entire contents of the bookstore, and gives rise to a chilling effect upon all who do not wish to have their customers ushered out, have their stores and theaters closed, and be led away in handcuffs.

The closing of the bookstore and the ushering out of customers was a clear prior restraint in violation of the First Amendment and due process. The Solicitor General asserts that this prior restraint was "purely fortuitous" and a mere "incidental effect" that can have no legitimate bearing on the decision of this case. Brief of the Solicitor General, at 16-17.

This Court has never recognized a "Fortuity Exception" to the First Amendment.

The chilling effect on *any* bookseller or film exhibitor of the mere threat that a police officer could commence criminal charges based on his personal judgment of obscenity must not be underestimated. This Court may take judicial notice of the fact that bookstores stock thousands of different titles at any given time; the economic incentive to keep any single title in stock is vastly outweighed by even the slightest threat of criminal charges based on the sale of that title.[2] The sale of periodicals is often a sideline for a merchant and therefore is even more susceptible to the chilling event caused by such a threat. Similarly, a film exhibitor will capitulate in the face of a threat of criminal action. Maxwell J. Lillienstein, counsel for the American Booksellers Association, has warned such chilling effects:

> "will constitute a serious blow to the right of Americans to publish, distribute, and read constitutionally protected materials."[3]

Petitioner claims that police officers may rely upon their own personal interpretation of obscenity to determine when criminal obscenity charges may be commenced. In support of this notion, petitioner cites this Court's footnote remark in *Miller* that it is not constitutional error for a trial court to admit expert testimony by a police officer on the issue of community standards. *Miller* v. *California*, 413 U.S. 15, 31 n.12 (1973). Having a police officer testify in aid of a judicial determination of obscenity, however, is wholly different from allowing the police to proceed on

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[2] "Since the average retailer or wholesaler of books and magazines carries thousands of titles at any given time, the removal of a single title will not cause him serious monetary loss." Lillienstein, *"Human Rights" vs. the First Amendment,* American Bookseller, June 1984 at 29.

[3] *Ibid.*

their own authority. This difference was highlighted four days after *Miller* was decided when this Court handed down its opinion in *Roaden* v. *Kentucky, supra,* reaffirming the requirement that a neutral and detached magistrate must render the determination as to whether there is probable cause to commence criminal obscenity charges. The *Miller* footnote cannot be contorted to impugn the longstanding holdings of this Court requiring judicial determination of obscenity before criminal charges may be brought. *Lo-Ji Sales, Inc.* v. *New York, supra, Roaden* v. *Kentucky, supra; Lee Art Theatre* v. *Virginia, supra; Marcus* v. *Search Warrant, supra.* Those holdings acknowledge the constitutional imperative that producers, distributors and retailers of material presumptively protected by the First Amendment shall not operate in fear of criminal obscenity charges being commenced upon the personal interpretation and whim of any police officer.

> "[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn . . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . . ."

Bantam Books v. *Sullivan,* 372 U.S. 58, 66 (1963), quoting *Speiser* v. *Randall,* 357 U.S. 513, 525 (1958). Even the obscenity determination of a Town Justice is constitutionally deficient when he fails to manifest the requisite neutral and detached nature. *Lo-Ji Sales, Inc.* v. *New York, supra.*

A limited confiscation of allegedly obscene material for the bona fide purpose of preserving it as evidence in a criminal proceeding does not require a prior adversary hearing on the question of obscenity *when the imposition of criminal charges is based on a magistrate's finding of*

probable cause. Lo-Ji Sales, Inc. v. *New York,* 442 U.S. at 327-28; *Heller* v. *New York,* 413 U.S. 483, 491-93 (1973).

The threat of commencement of criminal charges without prior judicial determination of obscenity effects a prior restraint in violation of the First and Fourteenth Amendments. The Solicitor General's remarks, that "a police officer's determination that a particular book or film is obscene will not go unreviewed by a court," is of little comfort. Brief of the Solicitor General, at 17. Given the choice between cleansing their stock to suit the tastes of the local police, or suffering the ignominy and expense of being charged with an obscenity crime, businessmen will capitulate. The fact that wrongful charges will be dropped after judicial review is insufficient to counteract the chilling effect.

The pattern and practice of police conduct here was calculated to harass and hinder the sale of material that was presumptively protected by the First Amendment unless and until a magistrate determined otherwise. The petitioner remarks in a footnote that "other clerks had been arrested earlier in the day at Silver News, obviously not preventing its operation by Respondent." Petitioner's Brief, at 41 n.11. Multiple, separate obscenity arrests of clerks in a bookstore on a single day indicate an intent to intimidate and harass.

The repeated harassment of the Silver News bookstore was part of a wholesale effort by the police to intimidate bookstores selling allegedly obscene material. Arrest warrants were obtained in some cases, but not in others. The petitioner states that the warrantless arrests of "defendant Bell" and an unnamed defendant were necessary due to "identification problems." Petitioner's Brief, at 6 n.3.

It is unnecessary to address the sufficiency of this explanation since *no reason at all* is stated to justify the warrantless arrest of respondent. A warrantless obscenity arrest is itself a prior restraint because it violates due process and imparts a chilling effect on the distribution of material presumptively entitled to First Amendment protection.[4]

Looking "through forms to the substance," the pattern of police conduct depicted in this case "plainly serv[s] as [an] instrument[ ] of regulation independent of the laws against obscenity." *Bantam Books* v. *Sullivan,* 372 U.S. at 67, 69. Imposition of criminal obscenity charges on the basis of an extra-judicial determination of probable cause renders First Amendment protections nugatory.

In *Bantam Books, supra,* this Court struck down as violative of the First Amendment a censorship scheme that involved no warrants, no confiscation of books, no closures of stores, no ushering out of customers and no arrests. The police tactics in the case *sub judice* have a far more frigid chilling effect than the conduct in *Bantam Books.* Because of the chilling effect of such tactics,[5] the warrantless arrests made by the police in this case should be treated as seizures with all the safeguards that are accorded to seizures of material presumptively under First Amendment protection.

The rationale for excluding evidence that is improperly utilized for a criminal prosecution is to deter police misconduct. *United States* v. *Leon,* 468 U.S. ——, 82 L.Ed.2d

[4] *Cf. Penthouse Int'l Ltd.* v. *McAuliffe,* 610 F.2d 1353, 1361 (5th Cir. 1980) ("Because [the police] activities constituted a calculated scheme of warrantless arrests and harassing visits to retailers, we must conclude that the *substance* of the procedures . . . created an informal system of prior restraint").

[5] *See supra* p. 7.

677 (1984). The police misconduct here is palpable and unmistakable. The decisions of this Court clearly mandate that a neutral and detached magistrate determine whether there is probable cause for the imposition of criminal obscenity charges. The police rankly disregarded this mandate and proceeded on their personal judgment as to what a bookstore may sell. Evidence for which the requisite judicial determination of probable cause was not obtained, must be suppressed. Any other result will constrict the availability of First Amendment protected materials to conform with the personal judgment of the local police.

CONCLUSION

For the reasons set forth above, we respectfully urge this Court to uphold the long line of precedents requiring a judicial determination of obscenity before criminal charges may be imposed and to affirm the order of the Maryland Court of Special Appeals.

Respectfully submitted,

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No. 84-778

IN THE

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OCTOBER TERM, 1984

STATE OF MARYLAND,

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v.

BAXTER MACON,

Respondent.

On Writ Of Certiorari To The Court Of Special Appeals of Maryland

BRIEF OF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF THE RESPONDENT

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On Writ Of Certiorari To The Court Of Special Appeals of Maryland

BRIEF OF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF THE RESPONDENT

STATEMENT OF INTEREST

The American Civil Liberties Union is a nonprofit membership organization founded to defend the personal freedoms guaranteed by the Constitution of the United States, particularly those embraced by the First Amendment. The ACLU was founded in 1920 and is made up of 50 state affiliates, some 350 local chapters, and more than 250,000 members.

The ACLU has a significant interest in the issues of this case, including (1) the continuation of special protections

* Petitioner and respondent have filed letters with the Clerk of this Court consenting to the filing of this *amicus curiae* brief.

of freedom of the press; (2) careful scrutiny of police practices effecting a prior restraint on First Amendment freedoms; and (3) concern that the governmental power of search and seizure not be utilized to impose prior restraints on free expression or suppress constitutionally protected publications.

SUMMARY OF ARGUMENT

1. When Detective Evans, without paying the purchase price, obtained possession of the magazines on whose sale Respondent's conviction rested, a seizure occurred within the contemplation of the Fourth Amendment. Since this seizure was neither authorized by a warrant nor justified by any exception to the warrant requirement, exclusion of the magazines from evidence was constitutionally mandated.

It is true, as Petitioner contends, that a police officer has the same right as any member of the public to enter a business establishment and inspect the merchandise offered there for sale. It is also true that purchase of such materials for evidentiary use in a subsequent criminal prosecution invades no reasonable expectation of privacy on the part of the merchant. Had Detective Evans, before taking any further action with respect to the Respondent, pocketed his change and his cash register receipt and taken his purchase, accompanied by a written application and appropriate affidavits, to a judicial officer for determination whether there was probable cause to believe that the publications were obscene, no Fourth Amendment question would arise.

When the detective, without Respondent's consent, retrieved the $50.00 bill he had tendered, however, he exceeded the scope of the invitation extended to the general public and, as the Court of Special Appeals of

Maryland correctly concluded, converted the transaction from a purchase to a seizure. This seizure was not authorized by a warrant nor supported by judicially determined probable cause. Under an unbroken line of this Court's authorities, the seizure of the magazines violated the Fourth and Fourteenth Amendments, and their suppression as evidence was required.

2. The same considerations that mandate a prior judicial warrant for search for and seizure of materials affected with a First Amendment interest apply with equal force to the arrest of persons suspected of violating the criminal law by reason of the possession, publication or distribution of such materials.

Respondent was convicted of selling certain magazines in violation of Maryland's obscenity statute. Not only the magazines themselves but his conduct in selling them were presumptively protected by the First Amendment. His arrest was groundlesss in the absence of probable cause to believe that the magazines were in fact obscene by legal definition. Since the legal test for obscenity is subtle and complex, and since an error in assessment poses grave risks of prior suppression of constitutionally protected expression, the determination of probable cause for arrest of a person, no less than that for search and seizure of publications, cannot be left to the unguided discretion of the arresting officer, but requires neutral and detached judicial evaluation.

That the police officers may have, according to their testimony, attempted in good faith to limit their discretion by basing their determination of probable cause on the criteria approved in prior warrants they had obtained in the course of this investigation does not purge Respondent's arrest and the seizure of the magazines of their illegality. Ratification of the officers' conduct would not

only ignore the particularity requirement of the warrant clause, but would flout the principle consistently applied by this Court, that when the Fourth Amendment requires judicial restraints, self-imposed restraints will not suffice.

The Court of Special Appeals properly concluded that the magazines should be suppressed as the fruit of an unlawful arrest.

3. Having concluded that the sole evidence presented by the State on the crucial element of the offense charged—the obscenity of the publications in question—was inadmissible, the Court of Special Appeals properly ordered the charging document dismissed. The court's decision amounted to a ruling that the trial court erred first in not excluding the magazines and then in failing to grant the defendant's motion for a judgment of acquittal, on the ground that without the excluded evidence, the prosecution had failed to prove guilt beyond a reasonable doubt.

Petitioner argues that when a reviewing court finds the essential evidence offered by the prosecution to be inadmissible, it must nevertheless remand rather than dismiss in order to give the state the opportunity to muster additional evidence if it can. This contention ignores one of the primary interests protected by the constitutional prohibition against double jeopardy: that the state should be given one full and fair opportunity—but only one—to offer whatever proof it can assemble.

ARGUMENT

I.

A Police Officer's Taking, From A Bookseller, Of Publications Alleged To Be Obscene Without Payment Of The Purchase Price Constitutes A Seizure Of Those Publications Within The Meaning Of The Fourth Amendment, And Such A Seizure, Unless Authorized By Warrant, Is *Per Se* Unreasonable.

Petitioner is of course correct in stating (Brief for Petitioner, p. 19) that a police officer, no less than any member of the public, may accept an invitation to enter business premises for the very purposes contemplated by the proprietor. *Lewis* v. *United States*, 385 U.S. 206 (1966). It is also true that the inspection and purchase of merchandise offered for sale in such establishments, even for evidentiary use in a subsequent criminal prosecution, invades no reasonable expectation of privacy in either the premises or the merchandise and hence does not constitute a "search." *United States* v. *Karo*, 468 U.S. ____, ____, 104 S.Ct. 3296, 3302 (1984); *United States* v. *Jacobsen*, 466 U.S. ____, ____, 104 S.Ct. 1652, 1656 (1984). This case would present no Fourth Amendment question had Detective Evans pocketed his change and his cash register receipt and taken his purchases, together with a written application and appropriate affidavits, to a judge of either the district or the circuit court[1] for determination whether there was probable cause to believe that the publications were obscene, and hence probable cause to arrest the Respondent for selling them.

When Detective Evans reached into the cash register and retrieved the $50.00 bill he had tendered (keeping the $38.00 change and the magazines), he was no longer acting as a mere business invitee. Instead, he substantially

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[1] Md. Code Anno., Art. 27, § 551.

interfered with Respondent's employer's possessory interest, *United States* v. *Jacobsen*, 466 U.S. at ____, 104 S.Ct. at 1656, in *either* the merchandise or the purchase money and, as the Court of Special Appeals of Maryland correctly concluded, converted what had been a lawful purchase into an illegal seizure.[2] As no appreciable time had lapsed between the officer's "purchase" of the magazines and his recapture of the money, it borders on sophistry to assert, as Petitioner does (Brief of Petitioner, p. 20) that once Respondent, on his employer's behalf, had voluntarily surrendered possession of the magazines in exchange for their purchase price, he had relinquished all interest in the merchandise, retaining an interest only in the money. Hypertechnical applications of principles of property law may not be used to defeat close scrutiny of police conduct in obtaining evidence. *Katz* v. *United States*, 389 U.S. 347, 352-53 (1967); *Warden, Md. Penitentiary* v. *Hayden*, 387 U.S. 294, 303-306 (1967).

> . . . [I]t is unnecessary and ill advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. *Jones* v. *United States*, 362 U.S. 725, 734 (1960), *overruled on other grounds*, *United States* v. *Salvucci*, 448 U.S. 83 (1980).

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[2] Det. Evans's recapture of the marked $50.00 bill, a standard procedure in undercover narcotics purchases, was in this context wholly unnecessary from an evidentiary standpoint, as his testimony, supported by his cash register receipt, amply established the purchase and sale of the magazines. Narcotics dealers, unlike booksellers, do not customarily give receipts.

The Court of Special Appeals correctly looked beyond form and penetrated to the heart of the transaction, exposing the false purchase as a device calculated to evade that aspect of the warrant requirement whose specific purpose is the protection of First Amendment freedoms. *Macon* v. *State*, 57 Md. App. 705, 715-16 (1984), *quoting State* v. *Furuyama*, 64 Haw. 109, 637 P. 2d 1095, 1101 (Haw. 1981).

The definition of unprotected obscenity is complex and subtle, calling at every step of its application for careful and exacting legal distinctions. *Miller* v. *California*, 413 U.S. 15, (1973); *Roth* v. *United States*, 352 U.S. 964 (1957). "[I]t is clear that as long as the *Miller* test remains in effect 'one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so.' " *Jenkins* v. *Georgia*, 418 U.S. 153, 164-65 (1974), Brennan, J., *dissenting*, *quoting Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 92 (1973), Brennan, J. *dissenting*. This Court has consistently adhered to the principle that discernment of the "finely drawn" line separating "legitimate from illegitimate" expression demands the "sensitive tools," *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958), of neutral and detached judicial evaluation prior to any search or seizure of books, printed materials or films. The process demands the greatest possible particularity of description, and the most stringent limitations on police discretion. *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319 (1979); *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978); *Roaden* v. *Kentucky*, 413 U.S. 496 (1973); *Heller* v. *New York*, 413 U.S. 483 (1973); *Lee Art Theatre* v. *Virginia*, 392 U.S. 636 (1968); *Stanford* v. *Texas*, 455 U.S. 971 (1965); *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963); *Marcus* v. *Search Warrants*, 367 U.S. 717 (1961).

The seizure accomplished by artifice in the present case was neither authorized by a warrant nor supported by judicially determined probable cause to believe the publications in question were obscene. Since the events of May 6, 1981, culminated a two-month investigation of established, permanently located retail stores, there can be no colorable claim of the sort of "now-or-never" exigency that might excuse judicial evaluation prior to a seizure. *Roaden* v. *Kentucky*, 413 U.S. at 505-06.

The magazines were not seized, but lawfully purchased, until the purchase money was recaptured. This event was contemporaneous with Respondent's arrest. The warrantless seizure cannot be justified as incident to the arrest, however, because, for reasons to be discussed in Argument II, the arrest itself was unlawful.

Because the magazines were seized without a warrant, and neither exigency nor lawful arrest of the Respondent excused the warrant requirement, their exclusion from evidence was required.

II.

The Arrest Of A Person Suspected Of Selling Obscene Publications, No Less Than The Search For And Seizure Of Such Publications, Requires A Prior Determination Of Probable Cause, And The Issuance Of An Arrest Warrant, By A Neutral And Detached Judicial Officer.

The same considerations that mandate a judicial warrant prior to search for and seizure of materials presumptively protected by the First Amendment apply with equal force to the arrest of persons suspected of violating criminal statutes prohibiting possession, publication, sale or distribution of obscene matter. Chief among those considerations, of course, is the fear, well grounded in history, that the government's powers of

search and seizure may be employed as a means of suppression of unpopular or objectionable ideas. *See, e.g.*, *Marcus* v. *Search Warrants*, 367 U.S., 724-29. This fear was realized in the present case, as the arrest of Respondent, the only clerk present, compelled the closing of the store, thus denying the public access to presumptively protected materials.

In a criminal prosecution, unlike a proceeding for injunction or confiscation, the publications themselves are not on trial. It is, rather, the Respondent's conduct in selling them that Petitioner seeks to sanction. See *Roth* v. *United States*, 354 U.S. at 495, Warren, C.J., *concurring in the result*. Where, as here, *scienter* is not an issue, *cf. Smith* v. *California*, 361 U.S. 147 (1959), the nature of the materials is, however, dispositive of the defendant's culpability. Respondent's arrest was groundless in the absence of probable cause to believe that the magazines were in fact obscene under the *Miller-Roth* standard.

Since, as discussed above, the legal test for obscenity is subtle and complex, and since an error in assessment poses grave risks of suppression of protected expression, the determination of probable cause for arrest of a person, no less than that for search and seizure of publications, cannot be left to the unguided discretion of the arresting officers. Only a judicial officer can focus searchingly on the question of obscenity, as the First Amendment requires. *Marcus* v. *Search Warrants*, 367 U.S. at 732.

This Court suggested as much in *Roaden* v. *Kentucky*, 413 U.S. 496, which dealt with a warrantless arrest on an obscenity charge and the seizure of a certain film incident to the arrest. 413 U.S. at 497-98. A county sheriff had watched the film and concluded that it was obscene and that he therefore had probable cause to arrest the ex-

hibitor without a warrant for a crime committed in his presence. In holding that the film should not have been admitted into evidence, this Court relied on cases holding that a police officer's unreviewed conclusion that a particular expression is obscene is unsufficient to establish probable cause for the issuance of a search warrant:

> If, as *Marcus* and *Lee Art Theatre* held, a warrant for seizing allegedly obscene material may not issue on the mere conclusory allegations of an officer, *a fortiori*, the officer may not make such a seizure with no warrant at all. 413 U.S. at 506.

The court expressly disapproved the Court of Appeals of Kentucky's reliance on the following conclusion of a three-judge panel in *Hosey* v. *City of Jackson*, 309 F.Supp. 527 (D. Miss. 1970):

> [S]eizure of an allegedly obscene film as an incident to lawful arrests for a crime committed in the presence of the arresting officers, i.e., the public showing of such film, does not exceed constitutional bounds in the absence of a prior judicial hearing on the question of its obscenity. *Quoted in* 413 U.S. at 501.

This repudiated reasoning is precisely the rule that Petitioner urges this Court to adopt in the present case.

The existence of relatively prompt post-arrest procedures for judicial determination of probable cause[3] does

[3] Under Maryland law the initial post-arrest determination of probable cause to hold a defendant to answer is made by a district court commissioner, who is usually not a lawyer. Md. Code Anno., CJ, § 2-607; Md. Rules, Rule 2-416. Only if the defendant remains incarcerated after 24 hours is he entitled to be brought before a judge, and then only for review of the conditions of pretrial release Rule 2-416(g). By contrast, a warrant for search and seizure may be issued only by a judge. Md. Code Anno., Art. 27, § 551.

not cure the affront of arrest and incarceration solely on the basis of the arresting officers' conclusion that the selling of a particular publication does not merit the constitutional protection normally accorded to the booksellers' trade. Indeed, the prospect of arrest, with its attendant disgrace, anxiety and expense, may chill the bookseller in the exercise of his First Amendment right to sell protected materials even more than the threat of seizure of his stock in trade. This is particularly true when, as in the present case, the State by design proceeds not against the owners of the business, but against the sales clerks and cashiers. The loss of liberty falls directly on the employee; the loss of inventory falls only on the enterprise.

That the police officers may have, according to their testimony, attempted in good faith to limit their discretion by basing their determination of probable cause on the criteria approved in prior warrants they had obtained in the course of this investigation does not purge Respondent's arrest and the seizure of the magazines of their illegality. Ratification of the officers' conduct would not only ignore the particularity requirement of the warrant clause, but would flout the principle consistently applied by this Court, that when the Fourth Amendment requires judicial restraints, self-imposed controls will not suffice.

> The Government urges that, because its agents relied upon the decisions in *Olmstead* and *Goldman*, and because they did no more there than they might properly have done with prior judicial sanction, we should retroactively validate their conduct. That we cannot do. It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their esti-

> mate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search, itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. *Katz* v. *United States*, 389 U.S. 347, 356-57 (1967).

The Court of Special Appeals properly concluded that the magazines should be suppressed as the fruit of an unlawful arrest. *See Penthouse International, Ltd.* v. *McAuliffe*, 610 F.2d 1353 (5 Cir. 1980), and *State* v. *Furuyama*, 64 Haw. 109, both relied on by the Court of Special Appeals.

III.

Having Correctly Concluded That The Sole Evidence Offered To Prove A Crucial Element Of The Offense Charged—The Obscenity Of The Magazines In Question—Was Inadmissible, The Reviewing Court Properly Ordered The Charging Document Dismissed.

The Court of Special Appeals was correct in ordering that the charging document be dismissed for insufficiency of evidence, having rightly concluded that the illegally seized magazines should have been excluded. The magazines themselves were indispensable to establish the crucial element of the offense charged, the obscenity of the publications on whose sale the prosecution was predicated. With no evidence remaining on the issue of obscenity, fairness to the defendant, as well as considerations of judicial economy, required dismissal rather than remand. *Burks* v. *United States*, 437 U.S. 1 (1978).

In *Burks*, this court held that when an appellate court determines that the evidence presented at trial is legally insufficient to sustain a conviction, which is tantamount to a finding that the trial court erred in failing to grant a judgment of acquittal, it must dismiss the charging document rather than remand.

Petitioner argues that the *Burks* rule should not be applied to permit a reviewing court to assess the sufficiency of the remaining evidence after ruling that evidence essential to the state's case below should have been excluded. This question was left open as to the federal courts in *Greene* v. *Massey*, 437 U.S. 19 (1978), decided the same day as *Burks*. Maryland's position (Brief for Petitioner, pp. 43-50) is that in such situation the reviewing court must *always* remand in order to allow the prosecution an opportunity to present other evidence it may have available. This argument ignores the core value of the Double Jeopardy clause:

> The Double Jeopardy clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials. The Clause does not allow "the State . . . to make repeated attempts to convict an individual for an alleged offense," since "[t]he constitutional prohibition against 'double jeopardy was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.' " 437 U.S. at 11, citations omitted.

The prosecution is entitled to one, but only one, full and fair opportunity to offer whatever proof it can assemble. *Burks*, 437 U.S. at 16. In deciding what evidence to present at any trial, the prosecution risks a determination that its proof does not meet the reasonable doubt standard. Whether that determination is made by the trial

court, by the jury or by a reviewing court is irrelevant to the defendant's entitlement to judgment of acquittal. *Burks*.

Considerations of fundamental fairness as well as double jeopardy mandate that an appellate court retain flexibility in fashioning just relief when it finds that a conviction rested in large part—or, as here, entirely—on inadmissible evidence. The rigid position urged by petitioner would subject defendants to the needless expense, anxiety and public disgrace that further jeopardy entails and would further encumber an already overburdened judicial system. In *Burks* this Court assessed the authority of the federal courts of appeal under 28 U.S. § 2106. Principles of federalism demand that even greater deference be accorded to a state appellate court's determination of its own remedial power.

Respectfully submitted,

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No. 84-778

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF MARYLAND,

Petitioner,

v.

BAXTER MACON,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This brief will reply to arguments made by Respondent, the American Civil Liberties Union, and the American Booksellers Association, et al., without repeating arguments made in Petitioner's initial brief.

ARGUMENT

I.

RESPONDENT MAY BE PROSECUTED FOR DISTRIBUTING OBSCENE MATERIAL DESPITE THE ABSENCE OF A PRIOR FINAL JUDICIAL RULING THAT THE MATERIAL IS IN FACT OBSCENE.

Respondent first appears to claim that, until there has been a final judicial determination that a particular item is obscene, there is no crime in distributing it.[1] He was, he asserts, entitled to rely on the presumption of First Amendment protection and, because neither "Limited Edition Film Review #10" nor "Diamond Collection #1" had been adjudicated obscene prior to May 6, 1981, he could commit no crime by distributing them. This argument seriously

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[1] In arguing for one dispositive ruling that a particular item is obscene, Respondent's position is related to an issue phrased in the appellant's jurisdictional statement in Miller v. California, 413 U.S. 15, 34 n.14 (1973): "Appellant argues that once material has been found not to be obscene in one proceeding, the State is 'collaterally estopped' from ever alleging it to be obscene in a different proceeding." For a variety of reasons, the Court did not reach the merits of that issue.

misperceives the nature of the presumption and ignores the clear import of Miller, supra. With the adoption of "concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment," 413 U.S. at 29, there is "fair notice to a dealer" id. at 27, in such material that prosecution may occur. The presumption of First Amendment protection, like the presumption of innocence, is procedural rather than factual. Cf. Bell v. Wolfish, 441 U.S. 520, 532-33 (1979) (presumption of innocence allocates burden of proof at trial; it creates no substantive right of pretrial detainee in conditions of confinement). When dealing with books or films in the obscenity context, the presumption places constraints on seizures causing a prior restraint of free expression by requiring "a higher hurdle in the evaluation of reasonableness" under the Fourth Amendment. Roaden v. Kentucky, 413 U.S. 496, 504 (1973). Nothing in the prior decisions of this Court has suggested that States may not punish the distributor of an item unless it had

already been judicially declared obscene prior to the distribution. That argument should be rejected here.

II.

NEITHER THE WARRANTLESS ARREST OF RESPONDENT NOR THE RETRIEVAL OF THE PURCHASE MONEY REQUIRES SUPPRESSION OF THE MAGAZINES.

A.

DETECTIVE EVANS ACTED PROPERLY IN EFFECTING THE PURCHASE AND ASSISTING IN RESPONDENT'S ARREST.

In the course of his argument, Respondent obliquely mentions two facts, giving them undue significance. They are 1) that Detective Sweitzer arrested Respondent for a sale made to Detective Evans, implying a violation of the requirement of Maryland law that a warrantless misdemeanor arrest be made only for a crime committed in the arresting officer's presence; and 2) that Detective Evans was directed to purchase magazines whose covers depicted sexual acts that were distasteful to him, implying that Evans' standard for selecting the magazines was

deficient under the Miller test. Neither point need detain the Court long.

Although Detective Sweitzer was officially the arresting officer, Detective Evans was there with him as part of the arresting team shortly after the sale of the magazines. Moreover, it is not altogether clear that the common law presence requirement is "constitutionally indispensible." State v. Berker, 391 A.2d 107,111 (R.I. 1978). In any event, Evans' knowledge is presumed to be shared by a cooperating law enforcement officer, Illinois v. Andreas, ___ U.S. __, 103 S.Ct. 3319, 3324 n.5, 77 L.Ed.2d 1003, 1010 n.5 (1983). See also, United States v. Hensley, 469 U.S.__, 105 S.Ct. 675, 681-83, 83 L.Ed.2d 604, 612-15 (1985). The police team concept has been applied to the observation requirement for a misdemeanor arrest, Brown v. State, 442 N.E.2d 1109, 1115 (Ind. 1982); State v. Chambers, 299 N.W.2d 780, 782 (Neb. 1980). The arrest here, by Detective Sweitzer, accompanied

by Detective Evans, who personally observed the sale, complied with the "in the presence" requirement.

Respondent futher finds fault in the direction to Detective Evans to select magazines with depictions of explicit sexual conduct on their covers that were distasteful to him. He apparently claims that this standard is deficient under Miller, which is based, in part, on community, rather than individual, standards. Evans' selection standard and decision to purchase are irrelevant to the question whether the later arrest and retrieval of the money converted the purchase into a constructive seizure. Moreover, it is difficult to discern what other standard could have been applied. Only the covers of most magazines were visible because they were sealed in plastic. Consequently, prior to purchase the item could not be examined to determine: (1) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the purient interest or (2) whether the work, taken as a

whole, lacks serious literary, artistic, political, or scientific value, two thirds of the Miller test. See, Brief for Petitioner at 32 n.9. The only criterion that could be assessed from viewing the cover alone was whether the work depicts or describes sexual conduct in a patently offensive way. If an experienced vice squad officer found the depictions to be distasteful, there certainly would be a good chance that they were, in fact, patently offensive. Under the circumstances, the directions to Detective Evans, even if relevant to the disposition of the case, were appropriate.

B.

A PURCHASE, EVEN WHEN ACCOMPANIED BY AN INTENT TO RETRIEVE THE PURCHASE MONEY IF A WARRANTLESS ARREST ENSUES, DOES NOT TRIGGER APPLICATION OF THE EXCLUSIONARY RULE.

Respondent and the American Civil Liberties Union argue that the character of the police conduct in obtaining the magazines must be assessed in light of the actions taken after their purchase. Their position is that an unconstitutional seizure occurred when the

police retrieved the purchase money. The Exclusionary Rule, they argue, demands that the magazines be suppressed. This argument ignores the very clear pronouncements of this Court that only the fruits of unreasonable searches and seizures will be within the reach of the Exclusionary Rule. Unless the allegedly unconstitutional conduct bears a "causal relation" to discovery of the evidence, there is no "fruit" to be suppressed. United States v. Sharpe, ___ U.S. ___ (53 U.S.L.W. 4346, 4348, 36 Cr.L. 3917, 3199, March 20, 1985). Here, the later arrest and retrieval of the money did not influence the earlier obtention of the evidence. As the ACLU concedes (Br. at 5), there would be no Fourth Amendment question had the police purchased the magazines and not returned to arrest Respondent without a warrant. In short, there can be no tainted fruit before there is a poisoned tree.

The claim by Respondent that the events here paralled those in Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979), is totally unsupportable. The only

similarity is that a purchase occurred at the beginning of the sequence of events in both cases. However, in Lo-Ji, the ensuing extensive, six hour search, purportedly authorized by a warrant, was characterized as "reminiscent of the general warrant or writ of assistance of the 18th century against which the Fourth Amendment was intended to protect." Id. at 325. No such abuse occurred here.

The search condemned in Lo-Ji began when the magistrate and police entered the store five days after the purchase and proceeded to view films without paying, to examine magazines by removing wrappers, and to announce an intention to open each box of film. The inventory of items seized covered 14 pages and included 431 reels of film and 397 magazines. The magistrate was, at times, "one with the police and prosecutors in executive seizure," Id. at 328. Thus, when he viewed the film containers and films without paying, "he was not seeing them as a customer would ordinarily see them." Id. at 329. This Court did not

invalidate the surreptitious viewing of material for potential obscenity, even by a magistrate. Indeed, the role of the justice in Lo-Ji was contrasted with that of the judge in Heller v. New York, 413 U.S. 483 (1973), who "viewed a film in a theater as an ordinary paying patron," prefatory to issuance of a warrant for its seizure. The searching in Lo-Ji was significantly more intrusive than anything an ordinary customer would be able to accomplish. Accordingly, it was held to violate the Fourth Amendment. Here, of course, the police only viewed and purchased the magazines as an ordinary paying customer would. Their later actions, in arresting Respondent and retrieving the money, even if unlawful, are neither themselves a general search nor capable of converting the initial purchase into a general search.

C.

NEITHER THE FIRST AMENDMENT NOR PRIOR DECISIONS OF THIS COURT MANDATE A JUDICIAL DETERMINATION OF PROBABLE OBSCENITY PRIOR TO ARREST.

Respondent and both amici supporting him argue that this Court has already decided, in Heller v. New York, 413 U.S. 483 (1973) and Roaden v. Kentucky, 413 U.S. 496 (1973), that warrantless obscenity arrests are unconstitutional. Petitioner submits, much to the contrary, that it would be a strained and unnecessary extension of those prior decisions if the First Amendment is held to create a per se prohibition on obscenity arrests without a warrant.

In Roaden, the Court considered the seizure of a film as an incident to a lawful arrest. The seizure of the film was invalidated because it effected a prior restraint by taking the film from the commercial theater where it was scheduled to be played and replayed. There was no suggestion whatsoever that

the underlying arrest of the theater manager was unlawful. Had the Court ruled that a warrantless obscenity arrest was illegal, the search incident would automatically have been illegal and there would have been no need to examine an alternative basis for suppression in the First Amendment implications of the search incident. For all the reasons heretofore stated by Petitioner and the United States, the warrant requirement applied to the seizure of materials presumptively protected by the First Amendment should not be extended to an arrest of the distributor.

III.

THE DOUBLE JEOPARDY CLAUSE DOES NOT COMPEL THE DISMISSAL OF THE CHARGES IN THIS CASE.

Respondent argues, supported by the ACLU, with reference to Title 28 U.S.C. §2106, that the exercise of remedial power by the Court of Special Appeals should be accorded deference. The reference in Burks v. United States, 437 U.S. 1, 17 (1978), to that

code section explained that an appellate court may grant appropriate relief regardless of the specific relief requested by a party. No such question is presented here. The more serious flaw in Respondent's argument is that the Court of Special Appeals was not exercising discretionary authority, but rather was ordering the relief it thought the federal constitution required. Where federal law is cited and it is not clear that there is an adequate and independent state ground for a decision, this Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." Michigan v. Long, __ U.S. __, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201, 1214 (1983).

Furthermore, Respondent's focus solely on the necessity vel non of the magazines to successful prosecution ignores the differences in Maryland law between, on the one hand, an acquittal or dismissal, and the entry of a nolle prosequi, on the other. Under the Maryland Code, Art. 27, §737 expungement of

police and court records may be obtained immediately by a person who has been acquitted or whose charge is dismissed, without regard to the pendency of other criminal proceedings. The recipient of a nolle prosequi, however, must wait three years to file a petition for expungement and may not obtain that equitable relief if he has since been convicted of a crime or is then a defendant in a pending criminal proceeding. This distinction has been upheld against an equal protection challenge, Ward v. State, 37 Md. App. 34, 375 A.2d 41 (1977). That state law distinction should not be defeated simply because the State cannot demonstrate that the result in the immediate criminal proceeding will be different if the case is remanded without directions to dismiss. Rather, because the protections embodied in the double jeopardy clause are not offended when an appellate court reverses for the erroneous admission of evidence, the remand should not bar a retrial,

regardless of the apparent sufficiency of the remaining evidence.

CONCLUSION

For these reasons and those stated earlier, the judgment of the Court of Special Appeals of Maryland should be reversed.

Respectfully submitted,

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April, 1985